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FILED
JUL 11 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 218

GUY V. WHITENER, PETITIONER,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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Petitioner prays that a writ of certiorari issue to the Supreme Court of South Carolina to review the following judgments of that Court:

(1) Opinion No. 16960, filed February 8, 1955 (including order denying first motion to remand) (Appendix, pages 8-36).

(2) Order denying motion for rehearing, filed March 7, 1955. (Appendix, pages 38-39).

(3) Order denying second motion to remand, filed April 14, 1955 (including dissent by the Chief Justice) (Appendix, pages 45-47).

(a) **Citations to Opinions Below**

The opinion of the Supreme Court of South Carolina filed February 8, 1955 and the two orders of that Court, all as yet unreported, are printed in full in the Appendix.

(b) **Jurisdiction**

As appears above, the final order of the Supreme Court of South Carolina was entered April 14, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1257, par. 3.

An order from the Chief Justice of the Supreme Court of South Carolina granting a 90-day stay for application for this writ was filed in that Court April 14, 1955, and this Court has issued an order allowing this petition to be presented on and including July 13, 1955.

(c) **Questions Presented**

(1) Whether petitioner was denied due process of law and the effective assistance of counsel when he was forced to leave a hospital bed to defend himself on a capital charge of rape.

(2) Whether petitioner was denied due process of law by the repeated and continuous introduction of evidence of other crimes, separate and distinct from the charge on which he was indicted.

(3) Whether it was a denial of due process of law to submit the issue of common law rape to the jury where there was no evidence of force or violence.

(4) Whether it was a denial of due process to refuse to remand the case for a hearing on a motion for a new trial upon a showing that the State's two principal witnesses had denied the testimony upon which petitioner was convicted.

(d) **Constitutional Provisions Involved**

The writ is sought under the provision of the 5th Amendment of the Constitution of the United States, as amended

and extended by the 14th Amendment, in that the petitioner in his trial in the South Carolina court has been denied his liberty without the due process of law. It is also our contention that he was denied the effective assistance of counsel for his defense, guaranteed by the Sixth Amendment, by being forced to trial for a capital offense (rape) from a sick bed.

(e) **Statement of the Case**

Petitioner, unlike most persons enmeshed in the criminal law, is a man of standing and substance. This South Carolina lumber manufacturer is charged with the rape of an 11-year-old female with whose family petitioner had been friendly.

The record is replete with instances of unnecessary haste, undue urgency and compelling effort on the State's part to rush the petitioner through the court proceeding and into the penitentiary. The trial record—in its unexpressive and cold type—does not perhaps convey all of the forces aligned against petitioner—and in this petition they can only be suggested. But in all earnestness we ask this Court to read this record in its entirety and answer the question: does this trial accord with our conception of justice and our Constitutional guarantees?

We are cognizant of the fact that certiorari is not often granted in a case of this kind, but here is a defendant who has been brought into Court from a hospital bed, forced to defend himself against other serious moral charges, convicted of common law rape when there was no showing of force or violence and sentenced to fourteen years on testimony of witnesses who now admit their perjury. The Supreme Court of South Carolina has affirmed the conviction and denied a petition for rehearing in which the Federal Constitutional issues were reiterated (Appendix, pages 36-38). The points which we would have this

Court consider as bases for issuing its writ were raised in the Record and on Appeal in the following manner:

(1) Upon the first call of the case for trial petitioner's attorneys sought continuance on account of their client's severe and dangerous illness. The continuance, so properly granted on Thursday, was refused on the following Monday although petitioner was still in the hospital (Transcript, pages 57-58, 73-85). The point as to denial of due process under the Federal Constitution was specifically raised in this motion (Transcript, page 78, folio 309). This point was again raised in the appeal to the South Carolina Court (Appendix, page 7, Point II). Petitioner's inability to consult with his counsel was adhered to repeatedly at the trial and on appeal (Transcript, pages 73, 77, 95, 314-315, 494, 495).

(2) Affidavits submitted by the State in connection with an application for bond by petitioner contained references to other sexual acts by petitioner and to acts of intercourse in petitioner's presence by two teen-age boys who testified at the trial. The indictment contained a third count charging petitioner with aiding and abetting one of the boys to have intercourse with the prosecuting witness; this was properly stricken. The trial judge then made a highly technical ruling on the evidence, the effect of which was to let down all the bars. The specific instances in which evidence of different and distinct crimes was admitted are rife in the record (Transcript, pages 116-117, 120, 123, 124, 130, 132-133, 147, 152, 153, 157, 163, 171, 173, 180-181, 182-193, 195, 199, 212, 213, 236, 268, 292-293, 309-310, 347-349, 361-365, 415-418). These matters were considered by the South Carolina Supreme Court on appeal (Transcript, page 497; Appendix, pages 24-27).

(3) Although South Carolina has a statute on carnal knowledge of a woman child, the petitioner went to trial charged with common law rape *and* under this statute. The

case was submitted to the jury on both counts—although there was no evidence of force or violence (Transcript, pages 113-116, 136-137, 142-146, 161-165, 176-178). The defendant's counsel moved for a direction of verdict on common law rape at the conclusion of the State's case (Transcript, pages 318-319). The motion was overruled and the jury brought in a verdict of guilty on the common law rape count with a recommendation of mercy (Transcript, pages 442-443).

(4) Several months after trial, the prosecuting witness (who had been confined like a criminal prior to the trial in the South Carolina Industrial School for Girls) signed an affidavit repudiating in full her testimony about any alleged act of intercourse with petitioner (Appendix, pages 3-5). This affidavit was the basis for a motion before the South Carolina Supreme Court asking that the case be remanded to the trial court for hearing a motion for a new trial on after-discovered evidence (Appendix, pages 1-7). This motion was denied by the State Supreme Court (Appendix, pages 18-22). On the day after the decision was announced, the State's principal corroborating witness (who had testified as to another sexual act on the part of petitioner) denied his testimony, and another motion to remand was presented to the State Supreme Court (Appendix, pages 39-45). That motion was denied, with a dissent from the Chief Justice (Appendix, pages 45-47).

(f) **Reasons for Granting the Writ**

(1) Petitioner repeatedly sought continuance of the case to a term only three weeks away because of his illness and resultant inability to consult with counsel in his defense. The State insisted on trial, and, after delaying the case once on account of petitioner's condition, the Court issued a bench warrant ordering petitioner to be brought to trial from his hospital bed (Transcript, page 85). The

case was tried immediately before Christmas and the jury began its deliberations (which lasted two and a half hours without any "break" for lunch) on Christmas Eve.

Ordinarily an application for a continuance is a matter within the discretion of the trial court, but, like all discretionary matters, a clear showing of abuse is grounds for a reversal. See *Goldsby v. United States,* 16 S. Ct. 216, 160 U. S. 70, 40 L. Ed. 343, and *Delaney v. United States,* C. C. A. 1, 1952, 199 F. 2d 107. An arbitrary or capricious refusal of a motion for continuance in the face of a showing that the fundamental rights of the accused would be violated by an immediate trial is reviewable. 22 C. J. S. page 741 (Criminal Law # 482). The discretion of the court was abused in this case when petitioner was ordered to trial. The rule in South Carolina allowing review for an abuse of discretion is recognized in the opinion in this case, but the rule was not followed (Appendix, page 23).

But even more serious than the physical illness of petitioner was his resultant inability to consult with his attorneys and thereby present his defense properly and fully. As this Court said in *Avery v. Alabama,* 60 S. Ct. 119, 308 U. S. 444, 84 L. Ed. 377:

> "But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel . . ."

Even more in line with the facts of this case is the following statement from *Coplan v. United States,* C. C. A., D. C., 1950, 191 F. 2d 749, 89 U. S. App. D. C. 103, Certiorari denied, 72 S. Ct. 363, 342 U. S. 926, 96 L. Ed. 690:

> "It is well established that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him."

Our courts talk much of presumption of innocence, guilt beyond a reasonable doubt, the right to the assistance of counsel, a fair and impartial trial. But these principles amount to little more than technical observances and hollow forms if their substance is to be gutted by forcing a defendant to trial when he is in no wise prepared—physically or legally—for his ordeal.

The business of the courts must not be delayed for sham or frivilous reasons. But here petitioner made a showing for a continuance which should have been granted **without any doubt whatsoever.** This was a denial of the due process of law guaranteed by our Constitution, and then he has also been denied his constitutional right to counsel at his trial. Does not an American citizen who has **in effect** been given a life sentence have the right to rely on these constitutional fundamentals? We ask this Court to allow us to detail his grievances by granting him this writ.

(2) To the rule against admission of evidence of other crimes there are certain well defined exceptions; in a prosecution for a sexual offense, offenses **of the same kind** committed by a defendant with, or upon, the same prosecuting witness are admissible. 167 A. L. R. 565, 569. Thus acts of intercourse with the prosecuting witness prior to the crime with which petitioner was charged would have been proper.

But in this case the State did not show any other act of intercourse. Evidence of an alleged perverted act of sodomy by petitioner and of sexual acts upon the prosecuting witness by teenage boys was repeatedly admitted—all over objection. No other inference can be gained from the record. The technical dam which the trial court erected did nothing to prevent petitioner's being drowned in his defense by this flood of testimony.

The following citation from *Lovely v. United States*, C. C. A. 4, 1948 169 F. 2d 386, a rape case in which evidence of rape with another party was admitted at trial, states the rule correctly:

> "If such evidence were allowed, not only would the time of courts be wasted in the trial of collateral issues, but persons accused of crime would be greatly prejudiced before juries and would be otherwise embarrassed in presenting their defenses on the issues really on trial. In the case at bar for instance, not only was the trial prolonged by controversies foreign to the issue before the jury, but accused was called upon to defend another charge of rape, while his hands were full defending the charge contained in the indictment, and the jury was necessarily given the impression, although his character had not been placed in issue, that he was a bad man who had been guilty of other crimes and who might well be convicted on that account."

This petitioner was arrested, arraigned, tried and convicted on issues apart from and not germane to the charges specified in the indictment. The South Carolina case of *State v. Richey*, 88 S. C. 239, 70 S. E. 729, cited by the State on the trial and the State Supreme Court in its opinion, only stands for the proposition that evidence of other acts of intercourse with the same prosecuting witness is admissible. The rule set out in the leading case of *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, must not be "excepted away" in sexual offense cases until it is a rule of "sound and fury, signifying nothing."

To allow this conviction to stand on a record filled with evidence of other crimes is a denial of the due process guaranteed by the Federal Constitution. Petitioner is a victim of "guilt by association"—and that type of conviction is repugnant to our constitutional processes.

(3) The petitioner went to trial charged on two counts —common law rape and statutory rape. The two, while not

necessarily repugnant to each other, can certainly be differentiated and distinguished. That was not done at the trial—to the defendant's detriment. It cannot be denied that the finding by the jury on the greater (or common law) offense influenced the Trial Judge in imposing what amounts to a life sentence on the petitioner.

Common law rape has been defined by statute under our Anglo-Saxon system of jurisprudence since 1285. In that enactment, as well as in every subsequent statute, the essential elements of the crime are that it be without consent **and** with force (Appendix, pages 27-34). The statute under which this man was tried on the first count and under which he was convicted reads as follows (Section 16-71, Code of Laws of South Carolina, 1952):

> "Whosoever shall ravish a woman, married, maid or other, when she did not consent, either before or after, or ravisheth a woman with force, although she consent after, shall be deemed guilty of rape."

Statutory rape (or more accurately, carnal knowledge of a woman child) has been defined by statute since 1576, and the present enactment of the South Carolina code (Section 16-80) reads in part as follows:

> "If any person shall unlawfully and carnally know and abuse any woman child under the age of sixteen years such unlawful and carnal knowledge shall be a felony and the offender thereof being duly convicted shall suffer as for a rape; **provided however**, that when:
>
> "(1) The woman child is over the age of ten years and the prisoner is found guilty the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary for a term not exceeding fourteen years, at the discretion of the court; . . ."

Punishment for common law rape in South Carolina is set at death unless the jury recommends mercy in which

case the Trial Judge can sentence the defendant to from five to forty years (Section 16-72, Code of Laws of South Carolina, 1952). In addition to these three statutes, the South Carolina Constitution of 1895 contains the following provision (Article 3, Section 33):

> "No unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years."

The two statutes (common law rape and carnal knowledge of a woman child) both antedate the Constitution from an historical point of view, but, as the South Carolina Court pointed out in *State v. Gilchrist*, 54 S. C. 159, 31 S. E. 866 (decided in 1898) the constitutional provision is carried out by the latter statute (16-80) which thereby supercedes the common law.

The charge of the Trial Judge (Transcript, pages 436-440, 441-442) demonstrates beyond doubt the confusion which must have attended the jury's deliberations concerning this petitioner's fate. The opinion of the South Carolina Supreme Court also fails to make any distinction between the two offenses (Appendix, pages 31-34). The two statutes, with different punishments prescribed, were obviously not intended to cover the same offense.

Confusion—beginning with the indictment, persistent throughout the trial, inherent in the charge of the trial judge and carried out in the verdict of the jury—has resulted in a denial of due process to this petitioner. Could he be guilty of common law rape?

In the record there is no testimony of force or violence; the citations to the record have been made in our statement. The opinion of the Supreme Court of South Carolina cites testimony which, as it says, "might have been sufficient to carry the issue of force to the jury, had the issue been essential . . ." (Appendix, page 27). But in fact as

well as in law the testimony was insufficient. Force, we aver now as we have averred throughout this man's trial, is absolutely necessary for the crime of **plain common law rape**. The record resounds with testimony repugnant to rape; for, if there was any act of intercourse on the part of this petitioner, there was no outcry, no effort to break away, no attempt to leave, no apprehension on the part of her family.

Conviction of common law rape was improper under the evidence at this trial; it was a denial of due process of law.

(4) Finally we come to the ultimate issue: was this man tried on perjured testimony? The two principal witnesses for the State submitted affidavits, both sworn to under somewhat unusual circumstances giving them the ring of truth; both of them now deny the testimony without which petitioner could not have been convicted.

Under the South Carolina rule, a motion for a new trial upon after-discovered evidence must be addressed to the State Supreme Court while the case is on appeal to that court. This was done twice in this case: during the October, 1954 and the March, 1955 terms of that court. (See Appendix, pages 1-7 and 39-45.)

Both motions were denied. It is petitioner's position that these motions should have been granted if the showing furnished any bases for the granting of a new trial. The important thing to bear in mind is that the Supreme Court of South Carolina should not have passed on the merits of these motions; the highest state court was merely authorized to remand the cases to the trial court which was the tribunal to pass on the after-discovered evidence and authorize or refuse a new trial, as the showing there might warrant.

The Supreme Court of South Carolina therefore has passed on these motions without a proper hearing. Appellate courts, because of the pressure of their business, cannot and should not consider motions of this type on the merits. Here again petitioner has been given summary treatment and not accorded the due process to which he is entitled under the Federal Constitution. Remanding of the cases to the trial court would give the petitioner an opportunity to make a full showing before a trial judge who could then determine whether the case should be reopened upon the basis of the present statements of these witnesss as contrasted with their statements on trial.

The rule with reference to after-discovered evidence is summarized as follows by the Georgia Court:

> "Where, from the affidavit submitted in connection with a motion for a new trial, based on newly discovered evidence, it appears that the testimony relates to material facts which, upon another investigation, would likely produce a different result, and could not, by the exercise of ordinary diligence, have been obtained at the trial, a new trial should be granted. This is true even though it be impeaching in its character, if it tends to establish a new and independent fact indicating the defendant's innocence. *Saylors v. State,* 9 Ga. App. 227, 70 S. E. 975."

The South Carolina rule is the same. See *State v. Mathis,* 174 S. C. 344, 177 S. E. 318, and *State v. Corn,* 224 S. C. 74, 77 S. E. 2d 354. As these cases clearly demonstrate, it is within the prerogative of the trial judge to pass upon motions for new trial on after-discovered evidence. The requirement for addressing such motions to the Supreme Court during appeal is merely a technical requirement; certainly the court of last resort should not have denied the motions when more than a *prima facie* showing was made in each instance. The rule which has been announced by the South Carolina court in its decision of Feb-

ruary 8, 1955, and its order of April 14, 1955, means in effect that the Trial Court should grant such motions only when the case is remanded since the highest court will not remand any case in which the motion should be denied.

The petitioner has not been accorded a hearing in the court designated and equipped to pass on the merits of these motions. He comes here to seek that relief. The case should be remanded, as the Chief Justice of the South Carolina Supreme Court has forcefully suggested in his dissent.

(g) **Conclusion**

For the foregoing reasons, petitioner asks that this Court grant a Writ of Certiorari directed to the Supreme Court of South Carolina so that he can present to this Court, the final arbiter on the protection of his constitutional rights, the manner and extent to which he has been denied his rights on the trial and on appeal to his State's Supreme Court.

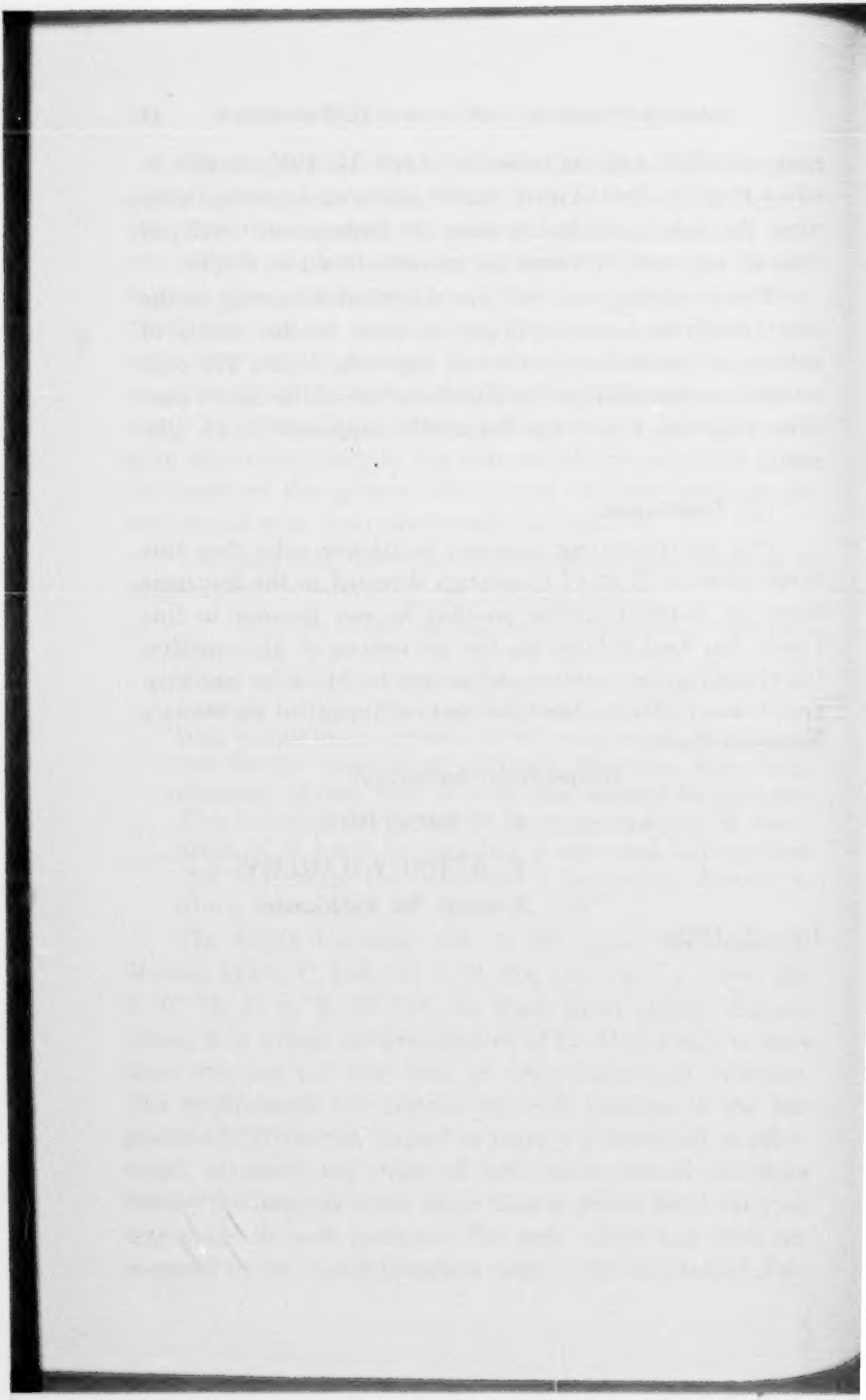
Respectfully submitted,

C. T. GRAYDON,

R. AUBREY HARLEY.

Counsel for Petitioner.

July 11, 1955.



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This appendix, in addition to the opinion and orders of the Supreme Court of South Carolina, contains motions and affidavits submitted in connection therewith necessary for an understanding of the matters presented by the petition. Ten copies of the trial transcript have been submitted to this Court.

A. **First Motion for Remand of Case:**

The following motion for remand of the case with supporting affidavits (formal parts omitted) was filed with and argued before The Supreme Court of South Carolina at its October, 1954, term:

To: HONORABLE T. POU TAYLOR, SOLICITOR, FIFTH JUDICIAL CIRCUIT:

You will please take notice that the undersigned, as attorneys for the defendant-appellant above named, Guy V. Whitener, will move before the Supreme Court of South Carolina on 11th of October, 1954, at 10:00 A. M., or as soon thereafter as the matter is assigned for hearing, for an order allowing and permitting the cause to be transferred to the Court of General Sessions for Richland County for the purpose of allowing and permitting defendant to make motion for new trial after discovered evidence, on the ground that said evidence was not available to the defendant at his trial and is material, pertinent and important in said trial and that said evidence was not available to defendant at said time; said motion to be based upon;

1. Affidavit of Reba Lewis stating that Guy V. Whitener never had any relations with her or any connection with her at all in any manner whatsoever and explaining the reason for her testifying in the Court as she did.

2. Affidavit of M. B. Tucker, a prospective juror, which clearly shows that Guy V. Whitener was in such physical condition at the time of the trial of the case that he was unable to and did not recognize a person who had dealt with the defendant for a long period of time and with whom relations were very cordial.

(a) **Affidavit of R. Aubrey Harley and C. T. Graydon:**

1. That they represent the defendant-appellant; that they represented Guy V. Whitener in the trial of his case in the Court of General Sessions for Richland County in December, 1953.

2. That their observation of said Guy V. Whitener was that he was an ill man and that he was unable to consult with his attorneys during the trial on account of his physical condition; that he seemed to be totally unmindful of the serious condition he was in and repeatedly stated to deponents that he was not able to remember certain material and substantial facts.

3. That your deponents were hopelessly handicapped in the trial of said case on account of the physical condi-

tion as well as the nervous condition of the defendant caused, as deponents verily believe, by his illness.

4. That when M. B. Tucker came to the box, after being accepted by The State, deponents inquired of Whitener as to whether he knew the juror or knew anything of him and that said defendant shook his head in a negative manner.

5. That at the time of the trial of the case deponents had not consulted with Reba Lewis since the alleged crime as she was placed in the Industrial School and no one could see her and discuss the case with her; that it was conveyed to R. Aubrey Harley that no one could see her except her mother on certain specified days in the presence of a matron.

6. That deponents verily believe that the affidavit of Reba Lewis and that of M. B. Tucker, hereto attached, are material to the cause and are necessary to a proper defense of the defendant and that by no diligence could these deponents have ascertained or discovered the true facts in the matter.

7. That since the trial the deponents have been advised that Reba Lewis desired to make a statement and that she made the statement in the presence of the following named persons:

D. N. Rivers, a former member of the General Assembly and Speaker *Pro-tem* of the House;

Y. C. Weathersbee, the present Senator from Jasper County;

J. W. Floyd, a resident of Jasper County;

R. L. Sensenbach, Clerk of Court for Jasper County;

C. W. Floyd, Present Sheriff of Jasper County.

John C. Billingsley, a resident and citizen of Newberry, S. C., and, that there were other persons who heard the statement who did not witness the same.

(b) **Affidavit of Reba Lewis:**

On the night that the policeman took Mr. Whitener and me to the police station, Mr. Rawlinson told me that if I did not sign the paper that he would not let me go home and would keep me in jail, and that I would never get to go

home. They made me sign the paper. Mr. Rawlinson did all the talking and told another man what to write on the paper. I did not know what was on the paper they made me sign. They took me home, but would not let me out of the car. Then they took me to a doctor. After that they brought me home. When I got home my mother asked me what happened, and I told her that Guy Whitener didn't bother me. I told her that I told the police Mr. Whitener didn't bother me, but they made me sign the paper anyway. I signed the paper because I was afraid.

When Mr. Rawlinson and Mr. Pou Taylor came to our house they told me and my mother and J. L. they were taking me to The Carolina Rest Home. They said that Mr. Whitener would have somebody to kidnap me or kill me. Two or three days later they came back, Mr. Rawlinson and another man, not Mr. Pou Taylor. They were talking to my mother and I heard Mr. Rawlinson say he had wanted to get his hand in Guy Whitener's pocketbook for a long time and now it looked like he had it. They took me to Mr. Pou Taylor's office where a magistrate met us. Then they took me to The Industrial School where I stayed until after the trial was over. They told me that they were taking me to a private school. I stayed there a long time. All of the time I was there, every night, the matron made me study what they had written for me to say in Court. After all the other girls had gone to bed they made me study the paper. My matron's name was Mrs. Kinlaw.

While I was at the Industrial School, every time I cried my teacher would slap me on my face. I cried a lot because I wanted to go home to my mother.

When they took me to the Court House, Mr. Rawlinson and Mr. Pou Taylor took me in a room and told me that if I didn't say what was on the paper I had studied, they would keep me at the Industrial School all of my life. I was scared not to say what was on the paper, even though it was not true. Mr. Rawlinson gave me a handful of money while I was in the room, before I went in the room with all the men. He said when I came out he would give me some more money. After I came out he gave me a dollar and told me if anyone asked me if he gave me any money

to say he gave me the dollar and not say anything about the handful of money.

They had told me that after I testified in Court I could go home with my mother, but they wouldn't let me; that is when I cried in the Court Room.

Mr. Whitener did not do anything to me, but those boys did.

(c) **Affidavit of M. B. Tucker:**

I am a citizen and resident of Richland County, South Carolina, living at 1308 Fairview Drive, Columbia, South Carolina.

In 1933 I established my residence in Newberry, South Carolina. Prior to that time I had been employed by Kendal Mills as office manager of the Pelzer-Tucapau Textile Mills for a period of thirteen years, and immediately prior to that, I was employed as office manager of the Kendal Mill at Edgefield for a period of four years. In 1933 I became wholesale dealer and retail dealer for the Pure Oil Company in Newberry, Laurens, Sumter and Clarendon Counties with my residence in the City of Newberry, South Carolina. In this business I operated a Pure Oil Filling Station on the corner of Harrington and College Streets in Newberry, South Carolina. I became acquainted with Guy Whitener, Sr. of Newberry, South Carolina and he became a customer at my filling station and at my bulk plant. At that time he owned and operated a good many trucks and one or two automobiles and so far as I know purchased practically all of his gasoline, oil and lubricants from my filling station in Newberry and from my bulk plant in Newberry for all of his motor vehicles and lumber mill, he being at that time engaged in the lumber business. As I recall, this account was the best account I had in Newberry. I would not say that Mr. Whitener and I became close friends, but I would say that our business and social relationships were very cordial.

In the latter part of 1933 I sold my business in Newberry and Laurens Counties and moved to Sumter where I lived two years and was the wholesale agent for the Pure Oil Company. In 1935 I moved to Columbia. I have been

engaged in the construction and building specialities business in Columbia for about twenty years and I am now so engaged in such business.

On September 13, 1953, I read in the Columbia newspaper that Guy Whitener had been arrested and charged with rape of an eleven-year old Columbia girl. While he was in the Richland County jail, and before he was granted bail, I went to see him at the jail and took him a package of fruit and food. I saw him there and talked with him for thirty or forty minutes. This was in September or the early part of October, 1953.

In December, 1953, I was summoned for jury duty at the December term of General Sessions Court for Richland County. My name was called, in Mr. Whitener's case by the Clerk of Court, as a potential juror, and the judge asked me several questions, then Mr. Pou Taylor, the solicitor prosecuting the case, accepted me as a juror. I looked at Mr. Whitener and his attorneys, Mr. Graydon and Mr. Harley, they conversed in low tones which I could not hear for a moment or two, and I saw Mr. Whitener shake his head negatively and then I was excused as a juror by the defense. I was within four or five feet of Mr. Whitener, and I looked straight at him, and I am sure that he looked at me, and I am equally sure that he did not recognize me. He looked directly at me and there was no sign of recognition in his face. I did not hear any part of the case except Mr. Whitener's testimony.

After Mr. Whitener's trial and while he was in the Richland County Jail, I went to see him again and I told him that I was surprised that he had refused to take me as a juror on his case. I told him that I had come to see him for two reasons, (1) because he was in trouble and I wanted to visit him, and (2) because I was very curious as to why he had refused to accept me as a juror. His verbatim words to me were "I declare, Dan! I was sick, I didn't know what I was doing, I didn't see you at all!"

[NOTE: Affidavits of W. H. Rawlinson, City of Columbia detective; Florence S. Mertz, superintendent of the South Carolina Industrial School for White Girls; Artimicha Kinlaw, matron of the School; Solicitor T. Pou Taylor;

E. M. Suber, a state law enforcement official; George A. Fulmer, city detective; R. A. Shealy, policeman, John W. Foard, Jr., assistant solicitor, and Cal M. Lawson, magistrate were submitted to the Supreme Court of South Carolina by the state with reference to the affidavit of Reba Lewis and in opposition to the motion, while affidavits of two doctors, Henry F. Hall and C. K. Lindler, were submitted with reference to the affidavit of M. B. Tucker.]

B. **Questions Presented on Appeal to Supreme Court of South Carolina:**

The Transcript of Record contains 50 exceptions which were summarized by petitioner on appeal to the Supreme Court of South Carolina in nine questions which are referred to in the opinion printed below. These questions, as set out in the brief, are:

POINT I

The Trial Court abused its discretion in not granting a change of venue on the showing that the case had been "pre-tried" in the local press and that tremendous prejudice existed against appellant. (Exception 1.)

POINT II

Refusal to continue the case on account of the physical condition of the appellant and the prejudiced feeling concerning this case was error of such magnitude as to entitle appellant to a new trial. (Exceptions 2, 3, 4, 5, 6 and 7.)

POINT III

Trial of this case immediately before Christmas and the submission of the case to the jury on Christmas Eve was clearly prejudicial and grounds for a reversal. (Exceptions 8, 9 and 36.)

POINT IV

The indictment, containing an improper count which was ineffectively ruled out by the Trial Judge, should have been quashed—a mere requirement for election on the part of the State being insufficient to protect appellant's rights. (Exceptions 10, 11 and 12.)

POINT V

Admission throughout the trial of evidence clearly pointing to and inferring the commission of sexual acts by some young boys at the instance of appellant was so erroneous and improper as to entitle appellant to a new trial. (Exceptions 13, 20, 22, 24, 25, 27, 28, 29, 30, 37, 38, 44, 45 and 46.)

POINT VI

Admission of evidence of a separate, distinct and abnormal sexual act by this appellant at a later time than the act for which he was on trial was extremely prejudicial and entitles appellant to a new trial. (Exceptions 14, 23, 26, 32, 33 and 34.)

POINT VII

Where the undisputed evidence showed (1) that there was no physical evidence of recent intercourse on the part of the girl involved; (2) no force or violence had been used at any time towards the girl, and (3) the girl made no attempt to escape, cry out or even complain—although she had numerous opportunities—the trial court erred in submitting the count of common-law rape (Count No. one) to the jury. (Exceptions 16, 17, 18, 19, 21, 31, 39, 40, 47 and 48.)

POINT VIII

The Trial Judge erred in giving identical definitions to the crime of common-law rape and the crime of statutory rape. (Exceptions 47, 48, 49 and 50.)

POINT IX

The manner in which the State conducted its case was prejudicial and so improper as to constitute error. (Exceptions 15, 35, 41, 42 and 43.)

C. **Opinion of the Supreme Court of South Carolina filed February 8, 1955:**

Although the opinion is lengthy and detailed, it contains a full statement of the case and the court's view of the applicable law. It is therefore reproduced in full below:

LEGGE, A. J.: At the December, 1953, term of the Court of General Sessions for Richland County, appellant

was indicted on three counts, the first charging rape, the second charging carnal knowledge of a woman child under the age of fourteen and above the age of ten years, and the third charging him with aiding and abetting another in the carnal knowledge of the same child within a few hours after appellant had raped her.

On December 14, 1953, appellant gave notice of a motion for change of venue, upon the ground that because of the unfavorable publicity that had been given to the charges against him in the press, on the radio, and otherwise, he could not obtain a fair and impartial trial in Richland County. The motion was heard on December 16, 1953, and refused. He then moved for a continuance upon the following grounds:

(1) That, as disclosed by the affidavits in support of the motion for change of venue, he could not at that time obtain a fair and impartial trial; (2) That the cause would require from three to five days for trial and would therefore not be concluded until a day or two before Christmas, which would be unfair to the defendant; (3) That his counsel had received information to the effect that there were two or three persons, living without the State, who might be material witnesses; and (4) That the solicitor had signed the indictment on the sheet containing the third count, and that the third count, which would thus necessarily have to be in the hands of the jury along with the first two, was such as to be prejudicial to the defendant. This motion was heard on December 16, and refused.

On December 17, when the case was called for trial, appellant's counsel moved for a continuance upon the ground that appellant was so ill that his life would be endangered if he were forced to trial at that time. In support of the motion, his physician, Dr. A. W. Welling of Newberry, South Carolina, testified that appellant at that time had a virus pneumonia and that it would endanger his life to attend trial that morning. Two of the county physicians of Richland county who had been sent by order of the court to the hospital at Newberry, where appellant was, testified that their examination that morning revealed that he had a slight fever, and that he was probably suffering from in-

fluenza; that they would not advise his standing trial at that time, but that under proper care and treatment he should be able to stand trial within from three to five days. The case was then continued to the morning of Monday, December 21, 1953.

At the call of the case for trial on December 21, appellant's counsel again moved for a continuance on the ground that he was too ill to stand trial. After consideration of affidavits of Dr. A. W. Welling and Dr. B. M. Montgomery, submitted in support of the motion, the court again sent the two county physicians to Newberry for the purpose of examining him; and upon their return they testified on the afternoon of the same day that his temperature was less than one degree above normal, and that they had found no evidence of virus pneumonia, pneumonitis, or any condition that in their opinion would make it dangerous to his life or health to stand trial at that time. The motion for continuance was then refused and the case ordered for trial on December 22, 1953.

Upon the call of the case for trial on the morning of December 22, appellant's counsel stated that appellant was in the court house, but was having a chill and high fever. The county physicians were again called and, after having examined him, testified that his temperature was perfectly normal and that he was, in their opinion, able to face trial. Appellant was then called to the witness stand by his counsel, and testified that he had had a severe attack of chills and fever the day before, and had had a "weak spell" a few minutes before. His wife was also sworn and testified that he had had a chill while at the hospital the afternoon before, and that he had had a weak spell a few minutes before. Thereupon appellant's counsel again moved for a continuance on the ground that he was physicially unable to go to trial; and the motion was refused.

Appellant moved:

1. To quash the indictment, upon the ground that it charged entirely distinct offenses;

2. To require the state to elect on which of the three counts it would go to trial; and

3. To strike the third count as charging an offense not forming a part of or connected with those set forth in the first two counts.

The motion to quash was refused, and the motion to require election was granted. Thereupon the state elected to go to trial on the first count. Appellant's counsel then stated that they desired to go to trial on counts one and two, and that count three be stricken out, whereupon, and at their request, it was so ordered.

The trial began at 2:30 p. m. on December 22; the taking of testimony was completed on December 23; and the case went to the jury at 11:35 a. m. on December 24. At 1:30 p. m. the jury returned, requesting clarification of the difference between count one and count two of the indictment; and having received instructions in that regard, they retired, and at 1:50 p. m. on December 24, 1953, returned a verdict of "Guilty of rape, with recommendation to the mercy of the court." A motion for a new trial was thereafter made and refused and appellant was thereupon sentenced to serve a term of fourteen years in the South Carolina Penitentiary or a like term upon the public works of Richland County. He now appeals to this court on numerous exceptions, which will be hereinafter discussed.

Pending the hearing of the appeal, appellant gave notice that he would move before this court for an order suspending the appeal and transferring the cause to the Court of General Sessions for Richland County for the purpose of allowing him to move there for a new trial upon after discovered evidence. The motion and the appeal on the merits were argued together before this court at the October, 1954, term; and the motion will be adverted to in the course of this opinion.

The prosecuting witness, eleven years old, lived with her mother, her fourteen year old brother, and her stepfather, a painter, on Jones Street, in the eastern part of the City of Columbia, whither they had moved from West Columbia some two weeks before September 17, 1953, the date of the alleged offense.

Appellant, a lumber manufacturer, forty-nine years of age, and married, lived in Newberry, South Carolina. He

had known the prosecuting witness and her family for about two years, his first acquaintance with them having occurred in connection with the painting of a house for him; had visited them at their home in West Columbia; and, when they were preparing to move to the Columbia address, he had, at the request of the prosecuting witness' mother, driven in company with the prosecuting witness and another member of the family to see the new location.

The prosecuting witness testified, in substance, as follows:

On the afternoon of September 17, 1953, while she was waiting to catch a bus to go on an errand for her mother to a laundry in West Columbia, appellant drove up in his car and offered her a ride. He took her to Hunter's Motor Court, went to the office, and, having gotten a key to cabin No. 3, drove there, and in spite of her remonstrance, took her by the wrist and made her go in with him. He locked the door, offered her a drink of whiskey, which she refused, and then told her to take off her clothes. She refused, and he "took them off for me", and then "he told me to go lay in the bed, and I did, and he took off his clothes", and proceeded to have sexual intercourse with her. She testified that when he started to get on top of her "he put my hands behind my head and kept trying to mash down, and I told him it was hurting, and I started crying". After about an hour of this, he told her to go into the bathroom and wipe herself off, which she did; and then at his request she lay on the bed and he "played with" her for some time. Then he told her to put on her clothes, and she did so, and they left the motor court in his car. At or near Sawyer's Drug Store there were several boys, one of whom, H. B. Sharpe, appellant invited to get in and ride around with them, which he did. After a while, appellant told Sharpe to get another boy and he would be back in five or ten minutes for them. Sharpe got out of the car, and appellant, after driving around with her, came back and picked up Sharpe and another boy, James B. Coleman. She testified that she did not know either of these boys, and that appellant introduced her to them. They all went back to Hunter's Motor Court, and to the same room; and there, in the presence of

the two boys, appellant committed an unnatural sexual act upon her with his mouth.

The testimony of the prosecutrix was substantially corroborated by that of Sharpe and Coleman, both of whom testified also that when they went into the room the bed was in disorder, and that appellant stated to them that he had already had intercourse with her. Each of these boys gave his age as sixteen years.

They left the motor court between nine and ten o'clock that evening, and appellant drove back to the drug store, where Sharpe and Coleman got out. He was driving the prosecutrix to her home when he was stopped by a city patrolman who, under orders from headquarters, was on the lookout for this car. Appellant was taken to police headquarters in a police car and the prosecutrix was taken there in appellant's car by police officer Derrick. As Derrick was getting out of the car at headquarters, there fell out of the car a key, to which was attached a plastic tag bearing the inscription "Hunter's Motor Court, 2322 Two Notch Road, Columbia, S. C. 13". Later that evening, having placed appellant in jail and having talked with the prosecutrix, Detective Rawlinson went with the prosecutrix and Detective Fulmer to Hunter's Motor Court. Key No. 13 proved to be a master key to any room in the motor court; and with it they opened Room No. 3, which consisted, in fact, of two rooms and a bath, one room being a combination living room and bedroom, containing one bed, and the other a bedroom with two beds. The first room was in good order; in the other, one of the beds was in disarray, the sheet on it was smeared and stained, and its pillow was on the other bed, the top spread of which, although rumpled, had not been removed. The bathroom was in disorder, and on its floor were two or three towels. An empty whiskey bottle and several glasses were on the bureau, and on one of the beds was a man's undershirt, later identified by the appellant as his own. From the operator of the motor court was obtained the registration card for Room No. 3, which was dated 9/16/53 and signed "John L. Baker". This signature was later identified by appellant as his own.

Rawlinson testified that upon his return from the motor court to police headquarters he told appellant what he had found and discussed the matter with him at length in the presence of another member of the police force, Mr. Shealey. To quote from Rawlinson's testimony:

> "I talked with him, and Mr. Shealey was present, and he made the statement that the bed was messed up, but that he didn't do all that himself; that somebody else had a part in it, and I told him that the charge was straight rape, and he said, 'That's awful severe, pretty rough', and I said, 'Well, that's what it looks like to me, and I am trying to be fair to you'. He said, 'Well, I am guilty of carnal knowledge or contributing to juvenile delinquency' ".

E. A. Shealey, who was present during the conversation between Rawlinson and the appellant, testified: "He said he wouldn't plead guilty to rape. Chief Rawlinson asked him about the rape, and he said he wouldn't plead guilty to rape, but that he had been with the little girl".

The prosecutrix was examined by one of the county physicians at his office about 1:00 o'clock a. m. on September 18. His examination revealed no evidence of injury, but disclosed more than the average amount of dilation of the female organs, a condition that in his opinion had existed for some time. In the opinion of another county physician, who examined her five days later, this condition, which included a completely healed rupture of the hymen, had existed for at least some weeks. Smears from the prosecutrix and the appellant were taken an hour or two after midnight of September 17 and sent later in the morning of the 18th to the Columbia Hospital for examination. In both instances the hospital reported that no spermatozoa was found. Examination of the sheet and towels taken from the room at the motor court, and also of the panties worn by the prosecutrix, was made at the laboratory of the State Law Enforcement Department on the morning of September 18, about 9:00 o'clock. It revealed semen stains on the sheet and one towel and on the panties.

Appellant testified, in substance, as follows:

On September 17 he drove from his farm in Jasper County to Columbia, bringing some venison to give to the family of the prosecutrix. He arrived at their home between 4:30 and 5:00 p. m., visited with them for fifteen or twenty minutes, and then left to go to West Columbia, where he had a business appointment with a man named John L. Baker, who was to meet him at Hunter's Motor Court at 5:30. He also was going to the Van Lott Company's place of business in West Columbia to see about replacing a wornout tractor clutch. As he was about to leave, the prosecutrix came out to his car and said that her mother wanted her to go to West Columbia to get some laundry, and that she would go with him. He drove first to Hunter's Motor Court, where he asked Mr. Hunter if he had received a phone call for him and if Mr. Baker had reserved a room. Receiving a negative answer, he told Mr. Hunter that he would take a room in Baker's name, which he did. After he had registered, a phone call came for him, which he answered; and then he talked with Mr. Hunter for five or ten minutes, at the end of which time Mr. Hunter gave him Key No. 13, saying that it was a pass-key, and that his room, the last available, was No. 3. Appellant, noticing that it was then 5:45 p. m., drove to Room 3, which was about a car length from the office, got out with his brief-case and, having first gotten a pitcher of ice, went into the front room, leaving the prosecutrix in the car. The day being very hot, he took off his shirt and undershirt and went into the bathroom, where, having put some ice in the basin, he proceeded to sponge himself down to the waist. When he walked back into the room, the little girl had come in. He said: "What are you doing here?" She replied: "I just wanted to look around and see. This sure is a pretty room." He then told her to go back and get in the car, that he would be out in a few minutes, and that he would have to hurry over to Van Lott's before they closed. Then he put on a shirt, leaving his undershirt off, got a paper out of his brief-case, left the brief-case in the room, and drove with the girl to the Van Lott Company's place of business, which he found closed. They next drove to the laundry, which also

was closed. Then the girl said: "Let's ride around and see if I can see any of my schoolmates or boy friends"; and he drove around where she directed. He drove back to Columbia, and on the way to Hendley Homes, where Baker lived, they were passing through Olympia, when she said she knew somebody there. He suggested that they stop at Shep's Drive-in and get something to eat, but she replied that she didn't want anything and would stay in the car and see if her boy friend came along. Appellant went into the drive-in, ate a hamburger, and came out at 6:45 p. m. The girl then asked him to drive about half a block to where there was a crowd of boys. One of them, whom Whitener knew only by sight, and whose name he learned, at the trial, was "H. B.", came up and spoke to him. The girl asked this boy where a certain other boy, whose name appellant did not recall, was; and "H. B." said that maybe "if we rode around a bit" he could find him. So "H. B." got in the car and directed appellant where to drive, and they came back without having found the other boy; whereupon "H. B." said: "If you will come back in a little while, maybe I can find him". Appellant then drove to Baker's home, found that he wasn't there, and then drove back to where they had left "H. B." He was there with another boy, named Jimmy, and said that he couldn't find the boy for whom he had been looking. The girl told appellant to let the two boys, "H. B." and Jimmy, get in the car and ride around with them. Appellant replied that he would do so, but that he would have to ride over to the motor court to see if Baker was there, and if he should not be there he would have to go back to Baker's house. So appellant drove back to Room 3 at Hunter's Motor Court, and they all went in. Appellant went into the bathroom, and the girl and two boys went into the bedroom. From the bathroom, appellant went into the living room, where he sat in a chair and read some reports that were in his brief-case. The door between the two rooms was ajar, but appellant did not go into, or look into, the bedroom. He heard the children laughing and talking in the bedroom. Appellant went outside once to the self-service soft drink stand. He read his reports for some fifteen or twenty minutes, and then the children came out

of the bedroom, and he said: "Baker hasn't come, and I have to go. Let's go". He then took the two boys back to where he had picked them up, put them out there and drove to the apartment next door to Baker's, where some woman's voice informed him that Baker had not yet come home. He then started to drive around the Belt Line to carry the little girl home, and was on the way to her house when he was stopped by the police patrol car. He denied having made any statement to Rawlinson except to request that Rawlinson get a doctor to examine him. Appellant denied that he had ever touched the prosecutrix. He testified that he had a contract with John L. Baker, to whom he had advanced some money. Appellant had known Hunter for a couple of years and had stayed at his motor court before. He had registered there in Baker's name some two weeks before, when he had had an appointment to meet him there and Baker had been a little late.

Mr. Ferris Hunter, the owner and operator of Hunter's Motor Court, testified that he had rented Room 3, his last vacancy, to appellant at some time between 5:00 and 7:00 o'clock on the afternoon of September 17; that his own house was some thirty feet from Room No. 3; that after renting Room No. 3 to appellant, Hunter stayed in the office of the motor court for about half an hour and then went to his house, where he remained for about three quarters of an hour shaving and bathing, during which time he heard nothing, although his window of the bathroom was open. He returned to the office, stayed there about half an hour, and left the motor court about 8:30 or 8:45 p. m., returning about 10:00 p. m. No complaint was made to him by any guest of the motor court. When appellant first came into Hunter's office, he asked if John L. Baker had been there. While appellant was in the office the telephone rang, and Hunter answered it. The person calling asked if appellant was there, and Hunter then handed the phone to appellant, who talked with the other party.

Dr. A. W. Welling, appellant's personal physician, testified that he examined appellant at the jail about 1:00 or 2:00 a. m. on September 18; that he saw no evidence

in the way of bruises or otherwise that would indicate recent sexual intercourse.

The following evidence was adduced by the State in reply:

H. B. Sharpe, recalled, testified that he saw appellant take off his undershirt after appellant and the witness and Coleman and the girl had gone into the room at the motor court.

James B. Coleman, recalled, testified that he also saw appellant take off his undershirt; that during the entire time that he and Sharpe and the girl were in the bedroom appellant was there also; and that appellant had said nothing about having a business engagement.

The prosecutrix, recalled, denied that she had asked appellant to take her to look for any boy friends; and she corroborated Coleman's testimony to the effect that appellant was in the bedroom during all the time that she and the two boys were there.

The motion for suspension of the appeal and transfer of the cause to the lower court for the purposes of a motion for new trial on after discovered evidence was based upon:

1. An affidavit of M. B. Tucker, a prospective juror who, upon the drawing of the jury for the case at bar, had been acceptable to the State but was not accepted by the defense; and

2. An affidavit by the prosecutrix repudiating her testimony at the trial.

Following is the substance of Mr. Tucker's affidavit:

In 1933 he was engaged in business in Newberry, Laurens, Sumter and Clarendon Counties as wholesale and retail dealer for the Pure Oil Company; and in that year he established his residence in Newberry, where he operated a filling station and a bulk plant. Here he became acquainted with appellant, who was a substantial customer, and, while they were not close friends, their business and social relations were cordial. In the latter part of the same year, 1933, Tucker sold his business in Newberry and Laurens counties and moved to Sumter, South Carolina, where he lived for two years. In 1935 he moved to Columbia, where

he has resided ever since. In September, 1953, having read in the newspaper of appellant's arrest, he visited him at the jail, carrying him some fruit, and talked with him there for thirty or forty minutes. At the trial in December he was accepted as a juror by the State but rejected by appellant, who apparently did not recognize him although he was standing within four or five feet. After the trial Tucker saw appellant in the jail and asked why he had been rejected as a juror, to which appellant replied that he had not seen him at all, and that he had been sick and had not known what he was doing.

This affidavit furnishes no sufficient basis for the motion. It will be recalled that when the case was called for trial appellant moved for continuance upon the ground of illness, and under the court's order he was then and there examined by two physicians, who pronounced him physically able to stand trial. The presiding judge thereupon ordered the trial to proceed; and there is nothing in the record of appellant's testimony to suggest that he was not in full possession of his faculties. It does not appear from the affidavit that Mr. Tucker maintained contact with the appellant, either in business or socially, after 1933, when Mr. Tucker left Newberry. For all that the affidavit discloses, he never saw appellant again until September, 1953, when he visited him in the Richland County jail. His conversation with him in the same jail after the trial must have taken place not later than March 30, 1954, when appellant was released on bond. The incident related in the affidavit must, therefore, have been known to appellant as well as to the affiant some six months prior to September 29, 1954, the date of the affidavit and of the motion for transfer of the cause.

The affidavit of the prosecutrix is to the effect that on the night of the arrest she was forced by Detective Rawlinson, under threat that she would be kept in jail, to sign a false statement incriminating the appellant; that when they took her home that night she told her mother that she had told the police that appellant hadn't bothered her; that a few days later she was taken before a magistrate in the solicitor's office, and then taken to the South

Carolina Industrial School for White Girls, where she stayed until after the trial; that every night, after all the other girls had gone to bed, she was required by her matron, Mrs. Kinlaw, to study "what they had written for me to say in court"; that whenever she cried her teacher would slap her face; that when she was taken to the court house Detective Rawlinson and Solicitor Taylor took her in a room and told her that, if she didn't say what was on the paper she had studied, they would keep her at the Industrial School for the rest of her life; and that while she was in the room Detective Rawlinson gave her a handful of money.

The averments of this affidavit are thoroughly and convincingly refuted by affidavits of Detective Rawlinson, Detective Fulmer, Officer R. A. Shealey, Magistrate Cal M. Lawson, Mrs. Florence S. Mertz, Superintendent of the South Carolina Industrial School for Girls, Mrs. Kinlaw, one of the matrons of said school, E. M. Suber, of the South Carolina Law Enforcement Division, Mr. John W. Foard, Jr., Assistant Solicitor, and Mr. T. P. Taylor, Solicitor of the Fifth Judicial Circuit, and an affidavit of a married sister of the prosecutrix. It is unnecessary to review these affidavits in detail. From Solicitor Taylor's affidavit it appears, among other things, that a day or two after the arrest he called, in company with Detective Rawlinson, at the home of the child's mother, and the prosecutrix then and there in her mother's presence related in detail what had occurred, substantially as she later testified; that the solicitor then suggested to the mother that in the interest of the child and of society the child should be placed in some institution until the case was ended, to which the mother agreed; that on September 25, 1953, the mother brought her to his office, where under a warrant issued by Magistrate Lawson she was ordered placed in the Industrial School for Girls and held there as a material witness in default of $5,000.00 bond, all of which was fully understood and agreed to by the mother; that thereafter on November 25, 1953, the mother caused to be instituted a proceeding in habeas corpus for the release of the prosecutrix, which proceeding was dismissed by Judge Henderson; that there-

after, on December 5, 1953, Magistrate Lawson increased the bond to $7,000.00, and before the bond could be posted, the solicitor instituted an action by the Superintendent of the South Carolina Industrial School, as plaintiff, against the prosecutrix and her mother, praying for the continued custody of the prosecutrix; that after fully hearing argument Judge Henderson ordered that the child remain in the Industrial School and ordered the cause referred to the Master for Richland County; and that before the matter could be heard before the Master the Court of General Sessions convened and any further effort to obtain the child's release from the Industrial School was thus forestalled.

Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial. *State v. Rhodes,* 44 S. C. 325, 21 S. E. 807; *State v. Mathis,* 174 S. C. 344, 177 S. E. 318; *Taylor v. Ross,* 150 Ohio St. 448, 83 N. E. (2d) 222, 10 A. L. R. (2d) 377; *People v. Caruso,* 14 N. Y. S. (2d) 349; *Commonwealth v. Gwizdoski,* 284 Mass. 578, 188 N. E. 383; *Keeley v. Great Northern Railroad Co.,* 139 Wis. 448, 121 N. W. 167; *Rigsby v. State,* 55 Okla. Crim. Rep. 61, 24 P. (2d) 1016.

If it be true, as the prosecutrix would now have us believe, that when she was brought home on the night of September 17, 1953, she told her mother that appellant hadn't "bothered" her, and also told her mother that she had told the police so, but that they had made her sign a false statement incriminating him, it is passing strange that the mother did not so testify at the trial and that she does not now corroborate her daughter's affiidavit. Moreover, the issue of whether or not the prosecutrix had made any such exculpatory statement was before the jury at the trial, as the following excerpts from her testimony will show:

Under cross examination:

"Q. Now, I ask you this question, and I put you on notice that I expect to contradict you: Haven't you on more than one occasion told people, including your mother and others, that you didn't accuse Mr. White-

ner of doing you any harm; that he had done you no harm; and that you had not been attacked by him?

"The SOLICITOR: Now, if your Honor pleases, in fairness to the little girl, if he is laying any foundation to contradict her, he has to state, within reason, the time and the place and the person to whom it was made.

"The COURT: That would be true if he undertakes to contradict her. That point will come up if he undertakes to contradict her.

"Mr. GRAYDON: I ask you is that your signature on here (indicating)?

"The WITNESS: Yes, sir".

Thereupon counsel for the appellant offered, for identification only, a handwritten statement signed by the prosecutrix, and the same was so marked. But the statement was never introduced or offered in evidence. On redirect examination the prosecutrix testified that on the Wednesday preceding the trial her sister had brought this paper to her at the Industrial School and had requested her to sign it, which she had done without knowledge of its contents. The following colloquy ensued:

"The SOLICITOR: Would you mind letting me see it, gentlemen?

"Mr. GRAYDON: We haven't put it in evidence.

"The SOLICITOR: Well, I would like to see it, and maybe I will offer it.

"Mr. GRAYDON: The paper is ours, and we have identified it. If we see fit, at the proper time we may introduce it in evidence and we may not".

The showing in support of the motion to transfer the cause to the lower court for the purpose of a motion for new trial is insufficient, and the motion is denied.

Appellant's exceptions, fifty in number, have been separately considered, but need not be separately discussed. As stated in his brief, they involve nine questions, which we shall take up in their order.

He first contends that the trial judge erred in refusing to grant his motion for change of venue, which was based, as we have stated, upon the ground that because of the

unfavorable publicity given to the charges against him he could not obtain a fair and impartial trial in Richland County. Such a motion is addressed to the court's discretion. *State v. Woods,* 189 S. C. 281, 1 S. E. (2d) 190; *State v. Thomas,* 198 S. C. 519; 18 S. E. (2d) 369; *State v. Gantt,* 223 S. C. 431; 76 S. E. (2d) 674. Careful consideration of the affidavits and newspaper clippings submitted in support of the motion, and of the affidavits submitted by the State contra, convinces us that the learned trial judge wisely exercised his judicial discretion in refusing to grant the motion.

Nor has appellant shown abuse of discretion in the trial judge's refusal to continue the case beyond December 22 because of the appellant's physicial condition and because of the feeling of prejudice against him. The several motions for continuance on the ground of illness have already been adverted to, and need no further discussion; and the claim of prejudice was properly disposed of on the motion for change of venue. Likewise without merit is appellant's contention that the trial judge erred in not continuing the case because the proximity of Christmas (Exceptions 8 and 9), and in refusing to declare a mistrial on appellant's motion at the conclusion of the State's case because it was then apparent that the trial could not be finished before Christmas Eve (Exception 36).

Appellant insists that the trial judge erred (Exception 10) in refusing to quash the indictment, upon the ground that it contained three counts each charging a separate and distinct offense; and further (Exception 12) in refusing to physically remove the third count or permit the solicitor to paste a sheet of paper over that count so that the jury would not have it before them in the jury room.

"The rule in this State is that distinct offenses—felonies or misdemeanors—may be charged in separate counts of the same indictment, whether growing out of the same transaction or not. If the several offenses charged do not grow out of the same transaction, then the proper practice is to require the prosecuting officer to elect upon which count he will proceed. But, when several offenses charged grow out of the same transaction, then the prosecuting

officer is not required to elect, and the court instructs the jury to pass upon the several counts separately, and write their verdict accordingly". *State v. Lee,* 147 S. C. 480, 145 S. E. 285. See also *State v. Maxey,* 218 S. C. 106, 62 S. E. (2d) 100. The motion to quash was properly refused.

As to Exception 12, the record shows that the solicitor's signature was on the same page that contained the third count, and that, in response to the request by counsel for appellant that this count be physically eliminated, the trial judge suggested that, if counsel would agree, this count might be removed and the solicitor could sign at the end of the second count.

Counsel being unable to agree to this, the solicitor offered to paste a piece of paper over the third count, but counsel and appellant refused to agree. We have been directed to no authority, and have found none, for the proposition that a stricken count must be physically removed from the indictment. It is sufficient in our opinion, that the trial judge instruct the jury to disregard it, as was done in the instant case.

Appellant charges (Exception 11) that the trial judge erred in refusing to grant the request of his counsel that the jury be excluded during the argument of the motion to quash and the motion to require election. This was a matter addressed to the court's discretion. Cf. *Roach v. Williams,* 109 S. C. 29, 95 S. E. 120. No abuse of discretion has been shown.

By several exceptions appellant charges error in admitting evidence of the unnatural sexual act committed upon the prosecutrix some hours after the original offense. There is no merit in these exceptions. While it is true as a general rule that in a trial for one crime testimony of other distinct and independent crimes is not admissible, exception is made where such testimony tends to establish a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others. Such exception is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit

intercourse between the same parties. *State v. Richey,* 88 S. C. 239, 70 S. E. 729. Over objection by appellant's counsel, the trial judge permitted two physicians to testify that an unnatural sexual act such as had been testified to would tend to withdraw spermatozoa from the vagina. This testimony was properly admitted, in view of the fact that Dr. Davis, who had examined the prosecutrix shortly after the arrest, had testified to the absence of spermatozoa. Nor was there error in permitting one of the physicians to testify that in the same person there may exist the desire for normal as well as unnatural sexual intercourse.

Fourteen exceptions are grouped by appellant in his brief under Question V, as charging error in the admission of "evidence clearly pointing to and inferring the commission of sexual acts by some young boys at the instance of appellant". Separate discussion of each of these exceptions is unnecessary, but we shall advert briefly to some of them.

Exception 13: Permitting the prosecutrix to testify that she and the defendant and two boys went to the same rooms that she had already been to.

Exception 20: Permitting testimony as to the picking up of the two boys, Sharpe and Coleman.

Exception 22: Refusing to strike the testimony of Sharpe as to the removal of his clothing and that of the prosecutrix and the appellant. The record shows that this testimony came out during cross-examination by defendant's counsel, and was, at his request, stricken as unresponsive.

Exception 24: Permitting Sharpe to testify that when he was riding around with appellant they were looking for a boy named Buck Brazzell, but did not find him, and that the witness found Coleman instead.

Exception 27: Permitting James Whitton to testify that he saw appellant and the prosecutrix in appellant's car on the evening in question, and that he had a conversation with appellant but did not go anywhere with him.

Exception 28: Permitting Bobby Taylor to be put up as a witness. This boy testified that he was with

James Whitton on the evening in question, and the solicitor then asked him if he had taken the license number of a car that night. Appellant's counsel having objected, the solicitor thereupon withdrew the witness.

Exception 29: Permitting the solicitor to examine the witness, Buck Brazzell, and refusing to instruct the jury to disregard his testimony. This boy testified that he had known appellant for some time. He was then asked if he knew anything about either Sharpe or the appellant looking for him "that night", to which he replied, "No, sir". The following colloquy between appellant's counsel and the presiding judge then appears in the record:

"Mr. GRAYDON: Judge, that's not relevant, or competent, or anything. This boy knows nothing about it. It's for no purpose whatsoever except to prejudice this defendant.

"The COURT: Well, I will strike that out, and instruct the jury not to regard any of the testimony of this witness".

Exceptions 37, 38, 44, 45 and 46: Refusing to strike the evidence relating to the picking up of the two boys, Sharpe and Coleman, and to the subsequent events at the motor court, and permitting the solicitor to cross-examine appellant on these matters. The gist of these exceptions is that the testimony referred to pointed to the third count of the indictment, which had been stricken, and that it was therefore prejudicial. Examination of the record reveals that there was no testimony of any sexual act committed by either of the two boys, and that the trial judge was most careful to limit the testimony of events occurring after the offense charged in the indictment to such as was relevant under the principles expounded in *State v. Richey, supra.* Moreover, as the trial judge pointed out in ruling upon appellant's motion for a new trial, the two young boys were material witnesses as to the condition of the beds and bedclothes at the tourist court, as to appellant's confession of the crime with which he was charged, and as to the unnatural sexual act. Being thus relevant,

material, and direct, this testimony was properly admitted. The rule permitting the exclusion of relevant evidence upon the ground that it would create unfair prejudice is applicable only when the evidence is merely circumstantial. 20 Am. Jur. Evidence, Sec. 253, p. 247; *Bunten v. Davis,* 82 N. H. 304, 133 A. 16, 45 A. L. R. 149.

Ten exceptions are grouped by appellant in his brief under Questions VII and VIII, as assigning error on the part of the trial judge in submitting the count of common-law rape to the jury, and in his charge to the jury on common-law rape and on statutory rape. These assignments of error are based upon the contention that force is a necessary ingredient of the crime of common-law rape where the girl is under the age of fourteen years.

In the testimony of the prosecutrix concerning the first visit to the motor court, we find the following:

"He went in the office and got a key to No. 3, and drove me down to No. 3, and then he opened the door for me, and I told him I didn't want to go in, and he took me by my wrist and hand and made me go in. * * * He walked in and locked the door, * * * and then he told me to take off my clothes, and I told him I wouldn't, and he took them off for me. And then he told me to go lay in the bed, and I did, and he took off his clothes. * * * and then he tried to get on top of me. He put my hands behind my head and kept trying to mash down, and I told him it was hurting, and I started crying".

While this testimony might have been sufficient to carry the issue of force to the jury, had that issue been essential, we shall disregard it, because in his charge the learned trial judge instructed them in effect that proof of force was unnecessary under the first count if the female was less than fourteen years of age and unmarried, and under the second count if she was under the age of sixteen. To quote from his charge:

"You must say, under the evidence in the case, whether or not the defendant had carnal knowledge of the female whose name is mentioned in the indictment.

If he did not have carnal knowledge of her, he would not be guilty under either of the counts in this indictment. If you find that he did have carnal knowledge, why then you pass on to the elements of force and consent.

"Ordinarily it is not rape unless it is done by force, force such as to overcome resistance. The required force is that by which a dissenting female is subjected to and put under the power of an assailant, so that he is able, notwithstanding her opposition, to have sexual intercourse with her. Ordinarily, also, rape can only be accomplished where it is done without the consent of the female.

"Now, the Constitution of our State has this to say: 'No unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years'. And, therefore, I charge you gentlemen that, if you come to the conclusion from the evidence in this case that the female, woman or woman-child, is unmarried, and if you find from the evidence that she is under the age of fourteen years, why then she cannot consent to carnal knowledge. It makes no difference whether she consented or not if you find from the evidence that she is under the age of fourteen years and unmarried. If a child is under the Constitutional age of consent of fourteen and unmarried, it makes no difference whether she consented or not. The unlawful carnal knowledge of an unmarried child under the age of fourteen years, either with or without her consent, is rape. The facts are, of course, for you gentlemen to say: What is her age? Is she under fourteen? Is she unmarried?—and, as I have said before, the fact which must be determined by the jury: Did the defendant have carnal knowledge of her?" * * *

"Let's take up now then the second count of carnal knowledge of a child under the age of sixteen. With reference to this count, you have again the decision on the question of fact: Was there or was there not carnal knowledge. And precisely the same law, which I stated

to you while discussing the first count, applies here as to what constitutes carnal knowledge. If the defendant did not have carnal knowledge of the female, he is not guilty under this count or the other. If you find that he did have carnal knowledge of her, why then the only other element you need inquire about, when you come to consider the second count, is simply whether or not she was under the age of sixteen. Under the age of sixteen years force or want of consent are not material. It is an offense even if done by the consent of the woman-child. Whether the woman-child consents or not, even if she does consent, if she is under sixteen it is unlawful for one to have carnal knowledge of such a person. The unlawful carnal knowledge, if you find it existed, which is purely a question of fact for you to determine, and the age under sixteen, are the only two elements constituting the statutory charge embraced in the second count in the indictment."

And when the jury returned for further instructions and the foreman asked the court to "clarify the difference in the two counts of the indictment", he said:

"All right, sir. Well, in count No. 1, and also in count No. 2, it is necessary for the State to prove carnal knowledge. The same rule applies as to that in both cases or both counts. Now, ordinarily, in the first count, which charges rape, in addition to carnal knowledge, the State must prove the use of force and the lack of consent of the female. However, even in the charge of rape at common law, if the female is under fourteen and unmarried, it makes no difference whether she consented or not.

"Now, in the second count, which charges carnal knowledge of a female under sixteen, why you still have the element of carnal (knowledge), but the only other element is the age limit—whether she is under sixteen years of age".

The first count of the indictment was laid under Section 16-71 of the 1952 Code of Laws, which relates to what is frequently referred to as "common-law rape", and the provisions of which are as follows:

"Whosoever shall ravish a woman, married, maid or other, when she did not consent, either before or after, or ravisheth a woman with force, although she consent after, shall be deemed guilty of rape".

By Section 16-72, rape and assault with intent to ravish are made capital offenses unless the jury shall recommend mercy, in which event the punishment for either offense is made confinement at hard labor in the State Penitentiary for not more than forty nor less than five years.

The second count of the indictment was laid under Section 16-80 of the 1952 Code, which relates to what is commonly referred to as "statutory rape", and which reads as follows:

"If any person shall unlawfully and carnally know and abuse any woman child under the age of sixteen years such unlawful and carnal knowledge shall be a felony and the offender thereof being duly convicted shall suffer as for a rape; *Provided, however,* that when: (1) The woman child is over the age of ten years and the prisoner is found guilty the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary for a term not exceeding fourteen years, at the discretion of the court;

(2) The woman child is over the age of fourteen years and under the age of sixteen years and the prisoner is found guilty the punishment shall be in the discretion of the court, not exceeding five years imprisonment; and

(3) The defendant is under eighteen years of age and the woman child is above the age of fourteen years previous unchastity may be defensively shown and if such want of chastity be found by a special verdict of the jury the punishment imposed by the court shall not exceed one year's imprisonment or a fine of not more than five hundred dollars alternatively awarded".

The progenitor of Section 16-71 was the old English statute of 13 Edward I, chapter 34, enacted in the year 1285, which reads in part as follows:

"It is provided, that if a man from henceforth do ravish a woman married, maid, or other, where she did not consent, neither before nor after, he shall have judgment of life and of member. (2) And likewise where a man ravisheth a woman married, lady, damosel, or other, with force, although she consent after, he shall have such judgment as before is said, * * *"

Section 16-80, on the other hand, is derived from the English statute of 18 Elizabeth, Chapter 7, enacted in 1576, Section 4 of which reads as follows:

"And for plain declaration of law, be it enacted, that if any person shall unlawfully and carnally know and abuse any woman child under the age of 10 years, every such unlawful and carnal knowledge shall be felony, and the offender thereof being duly convicted, shall suffer as a felon without allowance of clergy".

The two English statutes just mentioned were, along with numerous others, by act of the Assembly of the Province of South Carolina ratified December 12, 1712, declared to be of force in said province. II Stat. at Large, 401, 422, 499. Presumably the crime of rape remained, as it had been at common law, a capital one, until the Act of February 4, 1869 (XIV Stat. at Large, 175), which abolished capital punishment except in case of wilful murder and made the crimes of rape and arson punishable "by hard labor in the Penitentiary for life, or for a period not less than ten years, according to the aggravation of these offenses". By the Act of March 22, 1878 (XVI Stat. at Large, 631) rape was made a capital offense, with provision that upon recommendation of mercy by the jury the punishment should be reduced to life imprisonment. And thus the penalty remained until the Act of March 3, 1909 (XXVI Stat. at Large, 206), which prescribed the death penalty for rape or assault with intent to ravish, unless the jury should recommend mercy, in which event the punishment should be confinement at hard labor in the State penitentiary for not more than forty nor less than five years, at the discretion of the presiding judge. In passing, we note that prior to the 1909 act the penalty for assault with intent to ravish had been imprisonment at hard labor for not

exceeding thirty years (XXIV Stat. at Large, 532). It is interesting to note also that the language of Section 16-71 of the 1952 Code, defining rape, is substantially identical with that of the Statute of 13 Edward I, although the penalty has from time to time been changed by our statutes as before mentioned.

The Act of March 9, 1896 (XXII Stat. at Large, 223) referred to the crime of carnal knowledge and abuse of a woman child in language substantially identical with that of the Statute of 18 Elizabeth, except that the age of the woman child was changed from ten years (which is said to have been the age of consent at common law) to fourteen years, (which was the age of consent fixed by Article 3, Section 33, of the 1895 Constitution of South Carolina), and further provided for reduction of the penalty from that "as for a rape" to imprisonment for not exceeding fourteen years in cases where the woman child was over the age of ten years and the jury recommended mercy. By the Act of March 7, 1921, (XXXII Stat. at Large, 282) the age of the woman child was changed from fourteen to sixteen years, and the punishment was further graduated by provision that if the woman child was over fourteen and under sixteen years of age it should not exceed five years' imprisonment, and also that, if the defendant was under the age of eighteen and the woman child over the age of fourteen and the jury by special verdict found that she had previously been unchaste, the punishment should not exceed one year's imprisonment or a fine of not more than $500.00, alternatively imposed; and thus the law now stands.

Our statutes relating to rape (Code, 1952, Sections 16-71 and 16-72) and to carnal knowledge of a woman child (Code, 1952, Section 16-80) are, of course, subservient to the provision of Article 3, Section 33 of the Constitution of 1895, which declares that "no unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years". Consent on the part of the female being fundamentally inconsistent with the concept of rape, and indeed with its very definition, it is ordinarily an essential element of the crime that the act be committed without the consent of the female, or, as it is

otherwise expressed, against her will. 75 C. J. S. p. 473. And, in general, force on the part of the male and resistance on the part of the female are necessary ingredients of the crime, as indicative of nonconsent. 75 C. J. S. pp. 474, 475, 476. But the force may be actual or constructive, and the degree of force and of resistance required to characterize the act as rape must, of necessity, vary with the circumstances of the particular case. Thus sexual intercourse with a woman who is unconscious or insane is rape, and neither force nor resistance is necessary to constitute the offense. "Also, where the female is under the age of consent, force and resistance are immaterial and not necessary to constitute the offense. Hence, to constitute the offense on a female below the age of consent, the only material elements are the carnal knowledge and the age of the female". 75 C. J. S. p. 479. This conclusion is supported by the weight of authority in other states, and is clearly to be implied from the decision of this court in *State v. Wilson*, 182 S. C. 413, 161 S. E. 104, where the following from 33 Cyc. 1432, 1433, was quoted with approval:

> "The specific intent to commit rape is an essential element both of attempt to rape and of assault with intent to rape. Therefore, to convict of either of these offenses, it must be shown that the accused intended to have intercourse with the female by force or against her will, that, in case of assault, he not only used force, but used it with the intention of having intercourse notwithstanding any resistance on the part of the female, unless she was unconscious, insane, or of such an age that she was incapable of consenting".

The same reasoning whereby in the case of sexual intercourse with a woman who is unconscious or insane, the elements of force and resistance are held to be immaterial, or conclusively presumed, applies where sexual intercourse is had with a female who is under the age of consent. In one case physically, in the other as a matter of law, she is incapable of consenting. Since evidence of consent, even if admissible, cannot avail as a defense against the charge of rape where the female is under the age of consent, it is manifest that in such case neither force on

the part of the male nor resistance on her part is an essential ingredient of the crime. Where the female is under the age of fourteen and unmarried, the only other element necessary to be proven in order to establish the crime of rape is the fact that the defendant had sexual intercourse with her. Where she is under the age of sixteen, the only other element necessary to be proven in order to establish the crime of carnal knowledge under Section 16-80 is the fact that the defendant had intercourse with her. In neither case is it necessary for the State to prove force or want of consent, and the trial judge correctly so charged.

Appellant finally urges that the manner in which the prosecution was conducted was prejudicial and so improper as to constitute error; and in support of this contention he points to five exceptions, to wit:

Exception 15: That the trial judge erred in allowing the solicitor to propound leading questions to the prosecutrix. Although this exception does not specify the questions on which it is based, we have considered it nevertheless; and the record reveals that in the course of the direct examination of this witness in chief appellant's counsel objected to but five questions as leading. The first two objections were as to where and how long her family had lived in West Columbia before they moved to Columbia, and were properly overruled. The third was whether the surname by which she was known was that of her father or that of her step-father; and the trial judge sustained the objection, although he might properly have overruled it. The fourth was to the following question: "On about the 17th of September this year, did you see the defendant anywhere? Did you see Mr. Whitener anywhere?" The objection to this question having been overruled, the witness testified that she saw him "at the store" when she was "fixing to go catch the bus", but that she couldn't remember the date, or whether or not it was in September. And finally, after the witness had testified in detail as to appellant's actions after he had made her go into the room at the tourist court, appellant's counsel objected when the solicitor asked her: "Honey, I want to know whether or not he had sexual relations with you". In view of the

testimony which she had just given, the question was not leading, and the objection was properly overruled.

Exception 35: That the trial judge "erred after ruling that certain testimony of the witness Rawlinson was not proper, in failing to instruct the jury as to disregarding said testimony". We have carefully examined the transcript of the record of the testimony of this witness and fail to find that the trial judge ruled that any of it was improper.

Exception 41: That the trial judge erred in allowing the solicitor to examine the appellant concerning his relations with the sister of the prosecutrix, and to indicate by his questions that such relationship was improper. Cross examination of appellant as to his friendship with the sister of the prosecutrix was of especial importance because of the fact, hereinbefore mentioned, that shortly before the trial this sister had had the prosecutrix sign a paper which appellant's counsel had marked for identification but not introduced in evidence, and which presumably was favorable to the defense; and the record of this cross examination reveals no impropriety.

Exception 42: That the trial judge erred in permitting the solicitor to interrogate appellant as to a certain conversation between appellant and the mother of the prosecutrix. The particular conversation is not specified, but we gather that reference is to that portion of the cross-examination in which, appellant having admitted that a week before the trial he and the mother and the sister of the prosecutrix had had a conversation at Newberry, the solicitor proceeded to ask him: "Do you know anything you talked to them about yesterday a week ago? Do you know anything about this so-called letter or statement of something that Mr. Graydon produced here that they said this little girl's signature was on?" The question was not objected to, and the witness replied, also without objection: "No, sir, I have to leave those matters to my attorneys".

Exception 43: That the trial judge erred in allowing the solicitor to question the appellant "as to a certain paper which was not in evidence and which had no possible relationship or relevancy to the issues, said error being that this line of questioning was highly prejudicial to the defend-

ant, indicating that he had secured a paper which was not disclosed by wrongful and illegal methods". The "paper" referred to is obviously the written statement of which mention has been made in our discussion of Exceptions 41 and 42. Appellant's counsel had produced it, had had it marked for identification and had then declined to put it in evidence or to let the solicitor read it. Whether or not it was relevant to the issues was within the knowledge of appellant's counsel, but not of the solicitor. His examination of the appellant concerning it was entirely proper and was not such as to warrant the inference that the paper or statement had been obtained illegally or wrongfully. This exception is wholly without merit.

Because of the gravity of the offense with which appellant was charged we have considered many of the numerous exceptions in perhaps greater detail than their merit warranted. Appellant has been fairly tried, and the factual issues have been resolved against him by the jury. Careful scrutiny of the record reveals no error of law. All exceptions are overruled and the judgment of the lower court is affirmed.

STUKES, TAYLOR and OXNER, JJ., and G. BADGER BAKER, A. A. J., concur.

D. **Petition for Rehearing filed February 18, 1955, with Supreme Court of South Carolina:**

The petitioner, Guy V. Whitener, respectfully requests this Honorable Court to grant a rehearing and reargument of this case in respect to the opinion of this Court, speaking through Mr. Justice Legge, filed February 8, 1955.

REASONS RELIED UPON FOR GRANTING REHEARING AND REARGUMENT

With the utmost deference and respect to this Honorable Court, we submit that this Court, in affirming the judgment of the lower Court, misconceived the questions raised by the appeal from the Court of General Sessions for Richland County and has misapplied the law applicable to the facts of this particular case.

In accordance with Rule 17 of the Supreme Court of South Carolina, appellant submits the following reasons for the granting of a rehearing in this case:

(1) That this appellant will be denied due process of law guaranteed him by the United States Constitution, Amendments Five and Fourteen, by an affirmance of the action of the trial court in refusing to grant a change of venue or a continuance of the case until a term of the same court only three weeks away.

(2) That the judgment of the Trial Court should be reversed because appellant did not have the assistance of counsel in his defense, guaranteed by the Sixth Amendment of the United States Constitution, because of his physical condition before and during the trial of the case.

(3) That an affirmance by this Court would overlook the fact that appellant was confounded in his defenses by the physical presence in the indictment of an improper and prejudicial charge, not connected with the charges under which he was on trial, in violation of the constitutional right to be informed of the nature and cause of the accusation against appellant as guaranteed by the Sixth Amendment of the Constitution of the United States.

(4) That the admission of incompetent and irrelevant testimony of a highly prejudicial nature in regard to the commission of a separate and distinct sexual act, apart from those on which the appellant was charged, is such a denial of due process of law as to entitle appellant to a new trial under Amendments Five and Fourteen of the Constitution of the United States.

(5) That the conviction of appellant on a charge of common law rape, where there was no competent evidence of the use of force or violence, is such a denial of due process of law as to entitle appellant to a new trial under Amendments Five and Fourteen of the Constitution of the United States.

(6) That the imposition of a sentence of fourteen (14) years on a man in his 51st year for an alleged act of rape where no evidence of force or violence was adduced at the trial was cruel and unusual punishment within the prohibi-

tion of the First Amendment of the Constitution of the United States and is therefore grounds for a new trial.

(7) That through publicity before and during the trial of appellant and through the wide dissemination of rumors and reports about this case on account of the wealth, prominence and reputation of appellant, he has been denied the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

In accordance with the rule of this Court disallowing argument on petitions for rehearing, an appendix is attached to this petition setting out in the briefest terms possible the points which, it is respectfully and with all deference submitted, the law has been misapplied to the facts of this case and the manner in which the applicable law has been misapprehended.

Some of the points herewith submitted were not detailed or elucidated on at the trial or on the appeal to this Court, because of appellant's earnest belief that he would be found innocent on trial and that this Court would grant him a new trial on the various grounds of error set forth in his appeal. The constant allusion to rights guaranteed by the United States Constitution could only have been interpreted at the trial and on Appeal as reliance on procedural rights rather than on the substantive issue of his innocence. Appellant would be denied, it is respectfully submitted, those rights set out above by an affirmance of this case by this Honorable Court.

WHEREFORE petitioner asks for a rehearing of the case against him on the points set out in this petition.

E. **Order Denying Petition for Rehearing Filed March 7, 1955, by Supreme Court of South Carolina:**

"Upon careful consideration of the within petition we find that none of the matters referred to therein was either overlooked or misapprehended by the Court in the prepera-

tion of the judgment heretofore filed; hence the petition is denied.

T. H. STUKES, A. J.,
C. A. TAYLOR, A. J.,
G. DEWEY OXNER, A. J.,
LIONEL K. LEGGE, A. J.,
G. BADGER BAKER, A. A. J."

F. **Second Motion for Remand of Case:**

After the decision of February 8, 1955, but prior to the order denying motion for rehearing, the following (second) motion for remand of the case (with supporting affidavits) was filed with the Supreme Court of South Carolina.

To: HONORABLE T. POU TAYLOR, SOLICITOR, FIFTH JUDICIAL CIRCUIT:

You will please take notice that the undersigned, as attorneys for the defendant-appellant above named, Guy V. Whitener, will move before the Supreme Court of South Carolina on 14th of March, 1955, at 10:00 A.M., or as soon thereafter as the matter is assigned for hearing, for an order allowing and permitting the cause to be transferred to the Court of General Sessions for Richland County for the purpose of allowing and permitting defendant to make motion for new trial on after discovered evidence, on the ground that said evidence was not available to the defendant at his trial and is material, pertinent and important in said trial and that said evidence was not available to defendant at said time; said motion to be based upon:

1. Affidavit of H. B. Sharpe, one of the principal witnesses for the State in the case against Guy V. Whitener, stating that the said H. B. Sharpe had given testimony which was entirely untrue at the trial held in Richland County Court of General Sessions in December, 1953, and substantiating the account which the said Guy V. Whitener gave of his activities on the trial of the case.

2. Affidavit of R. Aubrey Harley, attorney at law, with reference to the manner in which the affidavit of the said H. B. Sharpe was obtained.

3. Affidavit of Carrie W. Whitener with reference to the manner in which the affidavit of H. B. Sharpe was obtained.

4. Affidavit of Guy V. Whitener with reference to the manner in which the affidavit of H. B. Sharpe was obtained.

In addition to these matters, the defendant-appellant reiterates the matters set forth in the affidavit of Reba Lewis heretofore submitted to the Court, which affidavit corroborates and substantiates the affidavit of the said H. B. Sharpe attached hereto.

(a) **Affidavit of H. B. Sharpe of February 10, 1955:**

On February 8, 1955 I read in the paper that the Supreme Court had decided the Whitener case against Mr. Whitener. It worried me because I knew that I had helped to convict him and the testimony that I had given against Mr. Whitener was untrue, at least most of it was untrue. I called Mr. Whitener in Newberry to tell him that what I had testified was untrue but did not reach him, but I talked to his wife. I called again on February 9 and I talked with Mr. Whitener about three o'clock in the afternoon of February 9 and told him that the testimony I had given was untrue that I was sorry that I had done it, but I had been forced to give the testimony that I had given.

For quite sometime before Mr. Whitener was tried in December, 1953, Mr. Rawlinson came to my house to see me once or twice a day, he was trying to get me to testify against Mr. Whitener. I had told him that I and Jimmy Coleman had had sexual relations with Reba Lewis and that Mr. Whitener had not touched the girl. Mr. Rawlinson insisted that he had and threatened me; that the threats he made were that he and Solicitor Taylor would send me to the Boys Industrial School at Florence if I did not help them convict Mr. Whitener. I was taken to the Court House five or six times before the trial and every time Mr. Rawlinson and Mr. Taylor, the Solicitor threatened to have me and Jimmy Coleman sent to Florence if we did not testify that Mr. Whitener had had sexual relations with Reba Lewis. They scared both of us and especially

Jimmy, I remember on one occasion Jimmy got so scared that he cried and they let him go home.

I am saying this now and swear to it because Mr. Whitener has lost his appeal and I do not want to see an innocent man serve any time and I blame myself and Jimmy Coleman for it. I should never have testified as I did but I was scared and I know that Jimmy was too. On the day of the trial Mr. Rawlinson and Mr. Taylor took me and Jimmy Coleman into a room and told us again what we had to testify to and that was that we had had sexual relations with Reba Lewis and that Mr. Whitener had had unnatural sexual relations with Reba Lewis. What we said about Mr. Whitener was not so, he did not touch the girl.

Neither Mr. Whitener nor any member of his family or anyone else has been to see me about this statement. I called Mr. Whitener twice from Columbia and he has not seen me since the day of the trial. He has not given me anything and no one else has given me anything for making this statement. He has not promised me anything and neither has anyone on his behalf promised me anything whatsoever for making this statement. I am making it of my own free will and accord and for the sole reason that I do not want my testimony to convict an innocent man.

(b) **Affidavit of R. Aubrey Harley:**

I am one of the attorneys for Guy V. Whitener. On February 10, 1955 H. B. Sharpe came to my office. Arthur Dwyer had gone to Columbia for him and had brought him to Newberry. Present other than Sharpe and myself were Mr. and Mrs. Guy V. Whitener, Guy V. Whitener, Jr., Arthur Dwyer, Mrs. Mildred B. Schmidt and Robert C. Lake, Jr. The statement which is in the form of an affidavit was given of his own free will. So far as I know he has not been paid anything or given anything and so far as I know he has not been promised anything by anyone. I have never seen Sharpe except in the Court House in Columbia in December, 1953 and in my office on February 10, 1955.

(c) **Affidavit of Carrie V. Whitener:**

I am the wife of Guy V. Whitener of Newberry, South Carolina. On Tuesday, February 8, 1955 H. B. Sharpe called me in Newberry from Columbia saying that he wished to speak to my husband Guy V. Whitener. I told him that my husband would not be home until the next day. He said that he would call the next day which was February 9, 1955. On February 9, 1955 he did call our residence and he did talk to my husband, Guy V. Whitener. On February 10, 1955 I saw H. B. Sharpe in the office of Mr. R. Aubrew Harley, one of the attorneys for my husband. I heard him make the statement which Mr. Harley took from him.

I have never seen H. B. Sharpe except on two occasions, one was in the Court House in Columbia, South Carolina in December, 1953 and the other time was on February 10, 1955 in Mr. Harley's office.

So far as I know, Sharpe has not been paid anything of value nor has he been promised anything by anyone for making his statement of February 10, 1955.

(d) **Affidavit of Guy V. Whitener:**

On February 9, 1955 my wife told me that H. B. Sharpe had called me on February 8, 1955. He called on February 9, 1955 and I talked to him on the phone. He was in Columbia and I was in Newberry. He told me that he wanted to see me, that he had something to tell me. He requested that I send someone to Columbia for him or that I go in person. On February 10, 1955 I sent my son-in-law Arthur Dwyer to Columbia for Sharpe. We met in the office of one of my attorneys, Mr. R. Aubrey Harley. I heard him make the statement which Mr. Harley put in the form of an affidavit.

I have not seen Sharpe since my trial in 1953. I have not paid him anything of value and neither have I promised him anything. No one has promised him or paid him anything in my behalf. The statement he made was of his own free will.

(e) **Affidavit of W. H. Rawlinson (In opposition):**

That he is one of the Detectives for the City of Columbia and was one of the investigating officers in the case of *State v. Guy V. Whitener*, tried at the December 1953 term of General Sessions for Richland County.

That he has read over the affidavit of H. B. Sharpe in which he charges with reference to this deponent the following:

> "For quite some time before Mr. Whitener was tried in December, 1953, Mr. Rawlinson came to my house to see me once or twice a day, he was trying to get me to testify against Mr. Whitener; I had told him that I and Jimmy Coleman had had sexual relations with Reba Lewis and that Mr. Whitener had not touched the girl. Mr. Rawlinson insisted that he had and threatened me; the threats he made were that he and Solicitor Taylor would send me to the Boys Industrial School at Florence if I did not help them convict Mr. Whitener. I was taken to the Court House five or six times before the trial and every time Mr. Rawlinson and Mr. Taylor, the Solicitor, threatened to have me and Jimmy Coleman sent to Florence if we did not testify that Mr. Whitener had had sexual relations with Reba Lewis. They scared both of us and especially Jimmy, I remember on one occasion Jimmy got so scared that he cried and they let him go home."
>
> "I am saying this now and swear to it because Mr. Whitener has lost his appeal and I do not want to see an innocent man serve any time and I blame myself and Jimmy Coleman for it. I should never have testified as I did but I was scared and I know that Jimmy was too. On the day of the trial Mr. Rawlinson and Mr. Taylor took me and Jimmy Coleman into a room and told us again what we had to testify to and that was that we had had sexual relations with Reba Lewis and that Mr. Whitener had had unnatural sexual relations with Reba Lewis."

Deponent states that said statement is false and untrue, and that he has never attempted to force the said

Sharpe to testify in said cause and neither has he attempted to have Sharpe testify to anything except the facts in said cause, and at no time made any threats to force him to testify to anything; that all statements made by Sharpe in the trial of said cause were voluntary and that this deponent in no way coerced or threatened him to give such testimony; that as far as deponent knows, he was present every time Solicitor Taylor conferred with Sharpe and other witnesses in said cause, and at no time did Solicitor Taylor threaten any witnesses in said cause.

That deponent reaffirms all statements made in former affidavits filed with this Court with reference to the investigation of the facts and the trial of the cause; that deponent has searched for Jimmy Coleman and finds that he is now stationed in Korea.

(f) **Affidavit of T. Pou Taylor (In opposition):**

That he is the duly elected and qualified Solicitor of the Fifth Judicial Circuit of the State of South Carolina, and prosecuted the above entitled cause in the Court of General Sessions for Richland County, at the December, 1953, term of said Court.

That he has read over the affidavit of H. B. Sharpe, dated February 10, 1955, filed in the above matter, and has noted particularly the following therefrom:

> "I was taken to the Court House five or six times before the trial and every time Mr. Rawlinson and Mr. Taylor, the Solicitor, threatened to have me and Jimmy Coleman sent to Florence if we did not testify that Mr. Whitener had had sexual relations with Reba Lewis. They scared both of us and especially Jimmy, I remember on one occasion Jimmy got so scared that he cried and they let him go home.
>
> • • •
>
> On the day of the trial Mr. Rawlinson and Mr. Taylor took me and Jimmy Coleman into a room and told us again what we had to testify to and that was that we had had sexual relations with Reba Lewis and that Mr. Whitener had had unnatural sexual relations with Reba Lewis."

Deponent states that such statements are absolutely false and untrue, unfounded in fact, and are made for the purpose of at this time in trying to aid the said Whitener in obtaining a new trial in said cause.

G. **Order Denying Motion to Remand to Court of General Sessions for the Purpose of Moving for a New Trial:**

PER CURIAM: Based upon an affidavit of the witness H. B. Sharpe repudiating certain of his testimony at the trial of this case in the Court of General Sessions for Richland County, and upon certain other affidavits, including that of the prosecutrix heretofore submitted to this court and referred to in the opinion filed February 8, 1955, the defendant-appellant moved before this court on March 14, 1955, to remand the case to the Court of General Sessions for Richland County for the purpose of permitting him to move there for a new trial on after discovered evidence. At the hearing of the motion on March 14, 1955, affidavits of T. P. Taylor, Solicitor of the Fifth Judicial Circuit, and W. H. Rawlinson, were submitted in opposition thereto.

After due consideration, we conclude that the showing in support of the motion is insufficient; and the motion is accordingly denied.

T. H. STUKES, A. J.,
C. A. TAYLOR, A. J.,
G. DEWEY OXNER, A. J.,
LIONEL K. LEGGE, A. J.

D. GORDON BAKER, C. J. (dissenting): It is with regret that I cannot concur in the order of the majority of the Court refusing motion of the defendant to remand this case to the Court of General Sessions for Richland County for the purpose of permitting him to move there for a new trial on after-discovered evidence; and especially is this so in view of the fact that I did not participate when this appeal was originally argued and passed upon. Notwithstanding that the prosecutrix in this case also recanted her testimony given at the trial, and prior to the writing of the opinion of the Court, I would have concurred therein, which opinion contains the statement hereinafter set out

with reference to the recantation of testimony by a witness, because, generally speaking, and ordinarily, this statement of the law is sound. Such statement reads: "Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial." (Citing authorities.) In one of the authorities cited, *People v. Caruso,* 14 N. Y. S. (2d) 349, it is stated: "There is no form of proof so unreliable and untrustworthy as the testimony of a recanting witness."

However, the recantation by the witness H. B. Sharpe of his testimony upon the trial of the case, comes under a different classification by reason of the unusual circumstances. It is upon such recantation that appellant bottoms his motion.

Sharpe can well be considered as the "star witness" for the prosecution. He gives a most plausible reason for having testified falsely upon the trial of the case, to wit, it saved him from being prosecuted (and convicted) of statutory rape, and the consequences thereof. His recantation of his testimony is all the more plausible for the reason that he is aware of the fact that he can yet be prosecuted (and in the writer's opinion, convicted) not only for statutory rape, but also for perjury, and having weighted such consequences, reached the conclusion that he could not live with himself while Whitener was serving a sentence in the penitentiary by reason of his perjured testimony. That Sharpe acted promptly to undo the great wrong he says he did Whitener upon learning of the affirmance of Whitener's conviction and sentence, cannot be denied. On the very day that he read in some newspaper that The Supreme Court had affirmed the conviction of Whitener, he undertook to get in touch with Whitener by phone and for the purpose of recanting, as he says, the untrue testimony he had given at the trial of the case.

It is not overlooked that the repudiation by the witness Sharpe of his testimony at the trial appears to relate only to his testimony as to an unnatural sexual act committed by Whitener upon the prosecutrix in his presence and not to the actual charge for which he was indicted and convicted. However, the writer cannot conceive of more damning tes-

timony, and which would have so affected any jury that they could not have given him a fair trial on the charge on which he was indicted. In other words, I don't believe it was humanly possible for the jury to dismiss from their minds testimony of this act of sodomy.

For the foregoing reasons, I am of opinion that the motion of the defendant-appellant to be permitted to make a motion before the lower Court for a new trial on this after-discovered evidence should be granted. This, of course, does not mean that a Circuit Judge will grant said motion, but it will give such Judge the opportunity of seeing and evaluating the testimony of Sharpe, and possibly that of the prosecutrix, who may be used as a witness in that she also recanted her testimony given at the trial.

FILED
SEP 3 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 218, [redacted]

GUY V. WHITENER, PETITIONER,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney General of South Carolina,

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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 218, Misc.

GUY V. WHITENER, PETITIONER,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

The Petitioner was convicted in the Court of General Sessions for Richland County, South Carolina, upon an indictment charging common law rape and statutory rape. A third count aiding and abetting the crime of rape by another person on the same prosecutrix was ordered stricken. The jury returned a verdict of Guilty of common law rape with recommendation of mercy, and Petitioner was sentenced to fourteen years on the public works of Richland County or in the South Carolina Penitentiary. From this conviction and sentence, and from an order denying a motion for a new trial, the Petitioner appealed to the Supreme Court of South Carolina. That Court considered on the merits all of the questions raised by the exceptions taken

both to the conviction and sentence and to the order denying the motion for a new trial, and affirmed the conviction. The decree of the South Carolina Supreme Court is found on pages 8 through 36 of the Appendix to Petition for Writ of Certiorari.

A full statement of the case is found in the South Carolina Supreme Court's opinion found on pages 8 through 12 of the Appendix to Petition. Further, the opinion contains a thorough analysis of the testimony taken at the trial from pages 12 through 18 of the Appendix. For that reason the statement therein is adopted without repeating same in this brief.

In the argument which follows, the questions will be considered in the order of their presentation in the Petitioner's argument accompanying his Petition for Writ of Certiorari.

ARGUMENT

Question 1

The Petitioner contends that he was denied due process of law in the failure of the trial court granting a continuance of the case because of his illness and the alleged resultant effect of his inability to confer with counsel during the trial.

It is universally recognized that continuance of a case rests entirely within the discretion of the trial judge, and that his refusal to grant a continuance will not be disturbed in the absence of an abuse of discretion. This proposition of law is so fundamental that citation of authorities is unnecessary. However, the following cases of this Court are noted:

Goldsby v. United States, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343;

Pickett v. United States, 216 U. S. 456, 30 S. Ct. 265, 54 L. Ed. 566;

Lias v. United States (1931, C. A. 4th, W. Va.), 51 F. (2d) 215, affirmed 284 U. S. 584, 52 S. Ct. 128, 76 L. Ed. 505.

Petitioner has shown no abuse of discretion on the part of the trial judge and, therefore, the ruling should not be disturbed.

He does contend, however, that he was denied the effective assistance of counsel at his trial, based on his illness, and in support thereof cites the case of *Avery v. Alabama,* 308 U. S. 444, 60 S. Ct. 119, 84 L. Ed. 377. An examination of this case would show that Petitioner can take no comfort from the same.

It appears that in the *Avery case,* the defendant, Avery, had been apprehended on Monday, March 21, 1938, on an indictment charging him with murder which occurred in 1932. He was arraigned on the date of his arrest and, not having counsel, was granted counsel appointed by the court. The case was ordered for trial on Wednesday, March 23, but was not reached until Thursday, the 24th. This Court held as a matter of law that the trial judge had not abused his discretion in refusing a continuance. This holding was proper.

The Petitioner cannot contend that he was denied the effective assistance of counsel in the instant case. Immediately following his arrest on the night of September 17, 1953, Petitioner contacted his attorney who left his home in a neighboring town some 42 miles away and conferred with Petitioner in the Columbia City Jail where he was being detained. This same counsel accompanied the police officers to the scene of the crime the next day while the official investigation was in progress.

The Petitioner was permitted to see his counsel at all times while he was incarcerated. He was released on bond on September 25, 1953, and remained at large until he was

convicted on December 24, one (1) day less than three months later.

During all this time between the commission of the offense and the commencement of the trial (more than three months), Petitioner and his counsel had ample opportunity to confer and prepare his defense to the pending charge, and, no doubt, many conferences were held in that time.

An authority cited by the Petitioner in his argument is the case of *Coplon v. United States,* 191 F. (2d) 749, 89 U. S. App. D. C. 103. It is noted that the objection in that case was to the use of wire-tappings on the telephone of defendant and thereby intercepting telephone conferences between defendant and her attorneys. Certainly, Petitioner does not make such contention in this case.

Question 2

In his discussion of this question, Petitioner states that "Evidence of an alleged perverted act of sodomy by Petitioner and of sexual acts upon the prosecuting witness by teenage boys was repeatedly admitted". An examination of the record will show that the trial judge was very zealous in seeing that nothing was permitted to be brought out with reference to any alleged acts committed by boys who were present when the Petitioner committed the perverted act of sodomy. The following citations from the transcript of record are noted:

Page 118, folio 471;
Page 120, folio 478;
Page 121, folio 481;
Page 123, folio 489;
Page 157, folio 625;
Page 163, folio 650.

In none of these instances did the court permit testimony of any acts of the boys with the prosecutrix.

The testimony on the perverted act was properly admitted. An excellent annotation on the question of evidence of other sexual offenses is found in 167 A. L. R. commencing at page 565. Quoting from page 594:

> "Evidence was held, in *State v. Taylor* (1928, 320 Mo. 417, 8 S. W. (2d) 29, a trial for statutory rape, to be admissible, where it showed that at the same time and place defendant not only committed the offense charged upon the prosecutrix, but that he also committed an act of sodomy upon her."

The general rule is stated in *State v. Richey,* 88 S. C. 239, 70 S. E. 729, as follows:

> "The general rule of evidence is that on trial for one crime, testimony of other distinct and independent crimes is not admissible.
>
> "But to this rule there are well established exceptions, well stated in *People v. Molineux,* 62 L. R. A. 240, in this language: 'Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial, Wharton Crim. Ev., 9th Ed., par. 48; Underhill Ev., par. 58; Abbott Trial Brief Crim. Trials, par. 599.' Two recent cases illustrate the exceptions, *State v. Davis, infra,* 204, wherein testimony of a subsequent homicide was admitted as a part of a scheme of murder connected with murder charged, and *State v. Duncan, infra,* 217 where testimony of subsequent offense was admitted to show motive and identity of prisoner."

See also *Bracey v. United States,* 142 F. (2d) 85, 79 U. S. App. D. C. 23, Certiorari denied, 322 U. S. 762, 64 S. Ct. 1274, 88 L. Ed. 1589.

There is yet another reason why testimony as to the perverted act was admissible in the instant case. It was testified that upon examination by a doctor shortly after the offense occurred, there was an absence of spermatozoa in the vagina of the prosecutrix. Such testimony would be admissible to show a probable reason for the absence of such matter, since, as was testified, such an unnatural act would tend to withdraw spermatozoa from the vagina.

There was no denial of due process of law to the Petitioner in the admission of such testimony.

Question 3

By this question, Petitioner contends that he could not have been guilty of common-law rape under the testimony in the case and that the testimony was repugnant to common-law rape.

The first count of the indictment was laid under Section 16-71 of the 1952 Code of Laws, which relates to what is frequently referred to as "common-law rape", and the provisions of which are as follows:

> "Whosoever shall ravish a woman, married, maid or other, when she did not consent, either before or after, or ravisheth a woman with force, although she consent after, shall be deemed guilty of rape."

By Section 16-72, rape and assault with intent to ravish are made capital offenses unless the jury shall recommend mercy, in which event the punishment for either offense is made confinement at hard labor in the State Penitentiary for not more than forty nor less than five years.

The second count of the indictment was laid under Section 16-80 of the 1952 Code, which relates to what is commonly referred to as "statutory rape", and which reads as follows:

> "If any person shall unlawfully and carnally know and abuse any woman child under the age of sixteen years such unlawful and carnal knowledge shall

be a felony and the offender thereof being duly convicted shall suffer as for a rape; PROVIDED, HOWEVER, that when: (1) The woman child is over the age of ten years and the prisoner is found guilty the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary for a term not exceeding fourteen years, at the discretion of the court;

(2) The woman child is over the age of fourteen years and under the age of sixteen years and the prisoner is found guilty the punishment shall be in the discretion of the court, not exceeding five years imprisonment; and

(3) The defendant is under eighteen years of age and the woman child is above the age of fourteen years previous unchastity may be defensively shown and if such want of chastity be found by a special verdict of the jury the punishment imposed by the court shall not exceed one year's imprisonment or a fine of not more than five hundred dollars alternatively awarded."

Our statutes relating to rape (Code, 1952, Sections 16-71 and 16-72) and to carnal knowledge of a woman child (Code, 1952, Section 16-80) are, of course, subservient to the provision of Article 3, Section 33 of the Constitution of 1895, which declares that "no unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years". Consent on the part of the female being fundamentally inconsistent with the concept of rape, and indeed with its very definition, it is ordinarily an essential element of the crime that the act be committed without the consent of the female, or, as it is otherwise expressed, against her will. 75 C. J. S., p. 473. And, in general, force on the part of the male and resistance on the part of the female are necessary ingredients of the crime, as indicative of nonconsent. 75 C. J. S., pp. 474,

475, 476. But the force may be actual or constructive, and the degree of force and of resistance required to characterize the act as rape must, of necessity, vary with the circumstances of the particular case. Thus sexual intercourse with a woman who is unconscious or insane is rape, and neither force nor resistance is necessary to constitute the offense. "Also, where the female is under the age of consent, force and resistance are immaterial and not necessary to constitute the offense. Hence, to constitute the offense on a female below the age of consent, the only material elements are the carnal knowledge and the age of the female". 75 C. J. S., p. 479.

Certainly there was ample testimony of force so as to submit the question of common-law rape to the jury. The prosecuting witness, a girl of 11 (while the Petitioner was a man of 49), testified that the Petitioner forcibly took her by the wrist and made her go into the room of the motor court (Record, p. 113, folio 450), that he took off her clothes when she refused to do so (p. 113, folio 452), and in the process of having intercourse held her hands behind her head (p. 114, folio 454). This indicated force.

Even in the absence of force, in a case such as this, force is not an element to be proven when the child is under the age of fourteen (14) years. *State v. Wilson*, 162 S. C. 413, 161 S. E. 104.

This question was properly disposed of by the South Carolina Supreme Court and the Petitioner was not denied due process of law by the disposition of same.

Question 4

The Petitioner contends by this question that he was convicted on perjured testimony and that he was denied due process of law by the failure of the South Carolina Supreme Court to remand the case to the Trial Court to allow

Petitioner to move in that Court for a new trial on after-discovered evidence.

As noted in Petitioner's argument under South Carolina procedure, while an appeal is pending in the Supreme Court, that Court must remand the case to the Trial Court for the purpose of entertaining a motion for new trial. Rule 24, Rules of the Supreme Court of South Carolina.

The Supreme Court, on the showing which was made, did not find it necessary to remand the case to the Trial Court for the purpose of moving for a new trial. The reasons for this refusal are explained in the opinion of the court and in the order refusing the second motion made subsequent to the filing of the original opinion.

On the question of the affidavits submitted by Petitioner on the motion to remand, the Court ruled as follows:

> "Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial. *State v. Rhodes,* 44 S. C. 325, 21 S. E. 807; *State v. Mathis,* 174 S. C. 344, 177 S. E. 318; *Taylor v. Ross,* 150 Ohio St. 448, 83 N. E. (2d) 222, 10 A. L. R. (2d) 377; *People v. Caruso,* 14 N. Y. S. (2d) 349; *Commonwealth v. Gwizdoski,* 284 Mass. 578, 188 N. E. 383; *Keeley v. Great Northern Railroad Co.,* 139 Wis. 448, 121 N. W. 167; *Rigsby v. State,* 55 Okla. Crim. Rep. 61, 24 P. (2d) 1016."

See also *U. S. Marachowsky,* 213 F. (2d) 235, certiorari denied, 75 S. Ct. 43, 348 U. S. 826, 99 L. Ed. Advs. 31.

The Petitioner, in printing the appendix to be attached to his Petition for Writ of Certiorari, mentioned certain affidavits which had been presented to the South Carolina Supreme Court in opposition to the first motion to remand. These affidavits are printed in the appendix hereto in order that the court may have all parts of the record before it in considering the propriety of granting a Writ of Certiorari.

CONCLUSION

The Petitioner was charged with one of the most dastardly crimes known to man, that of rape upon a young child. Upon trial he was convicted and sentenced to suffer the penalty imposed by the law of the State of South Carolina. Every right to which he was entitled was zealously guarded by one of the ablest attorneys of the State. His conviction was affirmed by the Supreme Court of South Carolina in a well considered and able opinion, and it is respectfully submitted that, under the applicable law, the judgment of that Court is correct and that this Court should deny the Writ of Certiorari in this case.

Respectfully submitted,

T. C. CALLISON,
Attorney General of South Carolina,

WILLIAM A. DALLIS,
Assistant Attorney General of South Carolina,

T. POU TAYLOR,
Solicitor of the Fifth Judicial Circuit of South Carolina,
Columbia, S. C.,
Attorneys for Respondent.

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RULE 24, RULES OF SOUTH CAROLINA SUPREME COURT

The following practice shall be observed in the matter of motions for new trials upon after discovered evidence:

First: In a case in which the Circuit Court has not been deprived of jurisdiction by appeal or otherwise the motion may be made in the Circuit Court.

Second: In a case which is pending upon appeal in the Supreme Court, the motion may not be made in the Circuit Court until after the Supreme Court by order upon motion thereof, shall have suspended the appeal and granted leave to the movant to make the motion in the Circuit Court.

Third: In a case in which the appeal has been disposed of by the Supreme Court and the remittitur transmitted to the Circuit Court, the motion may not be made in the Circuit Court until after the Supreme Court, by order upon motion, shall have granted leave to the movant to make the motion in the Circuit Court; and when the defendant shall be under sentence of death the motion in the Supreme Court must be made not later than the 10th day before the day assigned for the execution of the sentence (exclusive of said day), and upon four days previous notice to the Solicitor, with copies of the moving papers.

AFFIDAVIT OF T. P. TAYLOR

PERSONALLY appeared before me, T. P. Taylor, who, being duly sworn, deposes and says: That he is the duly elected and qualified Solicitor of the Fifth Judicial Circuit.

That during the December 1953 term of General Sessions Court for Richland County, there arose the case of *State v. Guy v. Whitener* in which Whitener was charged with the crimes of Rape and Assault with Intent to Ravish of one Reba Loretta Stankowitz (Reba Lewis), and immediately after learning of such occurrence, deponent, in company with W. H. Rawlinson, Aubrey Harley, Attorney for Whitener, and others visited the Hunters Tourist Court, located on the outskirts of Columbia, where the alleged assault took place, to inspect the rooms in which it occurred;

that he viewed and studied the rooms very carefully and continued the investigation by interviewing witnesses to the occurrence.

That shortly thereafter, possibly a day or two, he called, in company with W. H. Rawlinson, at the home of the mother of the said child and there discussed the case fully with the said mother and Reba Lewis; that Reba Lewis, in the presence of the mother, related to deponent in detail what had occurred and which was substantially as given in her testimony during the trial; that the mother at that time assured deponent of her fullest cooperation and acted as if she wanted the case prosecuted most vigorously; that deponent was then of the opinion, and subsequent events have proven the justification therefor, that in the interest of the child and in the interest of society the child should be placed in some institution until the case was ended and so informed the mother who then agreed most wholeheartedly with the suggestion; that the mother was then asked to bring the child to the office of the deponent the next day so that arrangements could be made to place her in some institution and full explanation was given that a warrant would have to be taken for her as a material witness for the State in order to accomplish such purpose.

Deponent further states that to the best of his recollection, the said mother brought Reba Lewis to his office on the 25th day of September, 1953, and it was fully understood and agreed that she would be placed in the South Carolina Industrial School under a warrant from Magistrate Cal M. Lawson and which was done; that deponent had been previously informed by the Mother and Reba as to assaults made upon her by her Uncle on one occasion and her brother on another, previous to the affair with Whitener, and was informed by the Mother that she had never prosecuted or attempted to prosecute either of these parties for the alleged assaults; that deponent was of the opinion then and is now of the opinion that certainly the environment of the South Carolina Industrial School would be an improvement over the environment of the home from whence this little girl came.

That deponent learned about this time that the Mother had employed counsel to institute suit against Whitener for damages because of the alleged assault (now Reba claims in her affidavit that on the night of the occurrence, she told her mother that Whitener had done her no harm) by the service and filing of a Summons (Complaint not served) and the petition and order for the appointment of a guardian *ad litem* for Reba Lewis in the office of the Clerk of Court for Richland County, and in the second paragraph of the petition for such appointment reads as follows: "Upon information and belief that the said Reba Loretta Stankowitz has a cause or causes of action against the Defendant, Guy Vanderbilt Whitener, as a result of certain personal injuries received by her, and indignities and assault and battery inflicted upon her"; that said petition is dated September 22, 1953, five days after the alleged occurrence and is sworn to by Helen S. Lewis, the mother, even though Reba swears in her affidavit of September 14, 1954, that she told her mother the night of the occurrence that Whitener did no harm to her.

That thereafter, deponent frequently discussed the facts in said cause with Mrs. Helen S. Lewis and her Attorney and she continued to assure him of her fullest cooperation and even requested permission to associate her attorney in the prosecution of the case, which was granted; Deponent recalls specifically that on the 19th day of November 1953, in his office, he discussed with her, her husband and her attorney the matter of the child remaining in the South Carolina Industrial School and the part that her attorney would play in the prosecution of the case but that a short time thereafter, deponent was informed by the attorney for Mrs. Lewis that he could not aid in the prosecution but had been instructed by Mrs. Lewis to bring *habeas corpus* proceedings for the release of the child from the institution.

That thereafter, to-wit, on the 25th day of November 1953, upon petition of the guardian *ad litem* for Reba Lewis, Judge G. Duncan Bellinger granted a writ returnable before the Honorable E. H. Henderson on the 30th day of November 1953; to this writ, return was duly made and

Judge Henderson refused the petition for the reason, among others, that the little girl was not being illegally restrained of her liberty as she was being held under a proper warrant as a material witness for the State and that since the Magistrate had already fixed bond at $5,000-.00, she should exhaust this remedy before the Magistrate.

That thereafter, to-wit: on the 5th day of December, 1953, after looking into the matter further, the Magistrate increased the bond to $7,000.00, and, before bond could be posted, deponent and his Assistant, John W. Foard, Jr., commenced an action in the Common Pleas Court with Mrs. Florence S. Mertz, Superintendent of the South Carolina Industrial School, as plaintiff, against the mother and Reba Lewis, praying for the continued custody of said child for the reason that the interest of Reba Lewis required that she remain in such institution; that after fully hearing arguments on said matter, Judge Henderson ordered that the child remain in the Industrial School and referred the matter to the Master of Richland County for a reference; that before the matter could be heard by the Master, General Sessions Court opened and on the first day thereof, deponent handed to the Grand Jury the bill of indictment against Whitener and attempted to set an early date for trial but defendant's counsel demanded the three days' waiting period; that shortly thereafter, the deponent was served with a petition for change of venue to Kershaw County and this was argued on Wednesday following the opening of the Court on Monday and refused; that deponent recalls distinctly that the defendant, Guy V. Whitener, was present in Court and apparently complained of no ill health when this motion was argued and disposed of.

That the case was then set for Thursday and on Thursday morning, deponent was informed by an outside source that Whitener was confined in the hospital in Newberry and that upon the opening of Court a motion would be made for a continuance due to his ill health; that deponent frankly states that he felt the urgency of trying this case at once as the mother of the child, her older sister, her stepfather and the attorney on the civil side had become

hostile to the prosecution of this case and, in fact, he was reliably informed that about 10 days before the Court, a Complaint for $500,000.00 damages had been served on the attorneys for the defendant at the request of at least one of them; that deponent further knew that he had about exhausted every effort to keep said child from the custody and possession of her hostile mother and, of course, Judge Henderson and all counsel knew of the terrific fight that was being made to secure her release from such institution.

That on Thursday morning of the first week of Court, the case was called for trial and a motion made for a continuance based upon the ill health of Whitener; and the transcript of record is complete as to the efforts made for a continuance on that ground and finally Judge Henderson set the case for trial on the following Monday of the second week; that on Monday another motion was made for a continuance, as shown by the record, and after hearing the witnesses and arguments of counsel, Judge Henderson ordered the case for trial and a bench warrant was issued for the defendant to have him in Court the next morning; that on Tuesday morning, December 22, 1953, when the case was again called for trial, one of the counsel for the defendant stated that the defendant was in one of the jury rooms and had just had a chill and was feverish; that deponent frankly states that he had anticipated such move and had instructed the physicians for Richland County to be present at the opening of Court so that if such move were made, an immediate examination could be had; that the two physicians were thereupon instructed by Judge Henderson to examine the defendant and their findings and their report are set out in the record in this cause; that as a result of their findings, Judge Henderson ordered the case to trial and deponent verily states that he observed no physical handicaps on the part of Whitener during the trial and has heard no complaints about his health since the trial; that deponent observed Whitener on the Stand, both on direct and on cross examination and there was no appearance of any illness affecting the giving of his testimony.

That deponent further states that Reba Lewis testified during the trial most willingly and that in his opinion the reading of her testimony would convince anyone that it could not have been untrue and that she was not testifying to a story forced upon her and out of her by the officers investigating the case and the Solicitor prosecuting it.

Deponent further states that he has at no time and no one in his presence or to his knowledge has ever threatened the little girl involved, and has never induced her or attempted to induce her to testify to anything except the truth in this cause and that any statement to the contrary is false, untrue and unfounded in fact; that at the time the said Reba Lewis was admitted to the South Carolina Industrial School and no time thereafter did deponent ask or instruct anyone connected with said institution or anyone else to read over to her any statement that she had previously given to the officers or to in anywise coax her as to what she should say during the trial.

Deponent further states that he never visited said institution while Reba was there and the only time he saw her after the commitment, as far as deponent can recollect, was in the Court House during the *Habeas Corpus* hearings and on the morning of the trial; deponent states though that on one occasion, in the presence of her mother, her counsel, stepfather, and Assistant Solicitor John W. Foard, Jr., he did call Reba Lewis over the telephone and inquire as to how she liked the institution and as to how she was getting along; that this conversation took place on November 19, 1953, and Reba was called for the reason that Mrs. Lewis and her counsel were complaining of her confinement and demanding her release; that on the morning of the trial, Reba Lewis was brought into the office of the deponent in the Court House by Mrs. Mertz and was talked to in the presence of Detective George A. Fulmer, Detective W. H. Rawlinson, Mrs. Florence S. Mertz, Superintendent of the South Carolina Industrial School, E. M. Suber of the South Carolina Law Enforcement Division, and Assistant Solicitor John W. Foard, Jr.; that deponent nor anyone else threatened the child or in any way intimidated her, and only asked that she tell the truth in

the Court Room; deponent recalls that some time later, possibly shortly before the lunch hour, he gave to Reba Lewis the sum of $1.00 for her to get little non-essentials that a child of her age would probably want; that the giving of this $1.00 was not intended to and deponent knows it did not influence the child in her testimony one particle.

Deponent further states that all during the trial, the mother and the older sister sat in the Court Room and their attitude toward this deponent and those engaged in the prosecution of this case was most hostile and both of them seemed to be very anxious to get to this child to influence her in some way; that after the verdict of guilty was rendered against Whitener, the said mother and the older sister joined members of Whitener's family in crying and otherwise showing emotion.

Deponent further says that, in his opinion, the motion now before the Court is one intended merely for delay and is typical of many other motions made to delay this case from being terminated; that as grounds for this belief and conclusion, in addition to what is said in the affidavits of others connected with the prosecution of this cause, deponent reads from the affidavit of Reba Lewis now before the Court that she told her mother on the night of the occurrence, to-wit: September 17, 1953, that Whitener had done her no harm, yet she remained in the custody of the mother until the 25th day of September, eight days thereafter when she was committed to the South Carolina Industrial School; that if she told her mother that Whitener did her no harm, deponent is at a loss to know why the mother, Reba or somebody else connected with her family did not inform the Solicitor of such fact; but on the contrary, on the 25th day of September, the mother joined with the Solicitor, Magistrate Lawson and others in having her committed to the South Carolina Industrial School; that in addition to this, deponent knew that there was served upon Guy V. Whitener, on the 22nd day of September 1953, five days after the alleged occurrence and before he was released on bond by Mr. Chief Justice Baker pending his trial, a Summons and Petition in a Civil Suit brought at the instance of the mother, as heretofore stated;

that in addition to the above, in none of the papers filed in the Writ of *Habeas Corpus* proceedings or otherwise was it stated that Reba Lewis had retracted her statement and that the statement given to the officers, a copy of which was in the hands of all attorneys connected with the defense, was untrue.

Deponent further states that in addition to this, the testimony at the trial shows that on Wednesday following the visit of the mother and older sister to Whitener's home on Tuesday, this sister, Annette Ball, presented to Reba a paper at the Industrial School, without reading it to her or letting the child see it, and obtained her signature; this identical paper was referred to by counsel for the defense in the cross examination of Reba but he never offered it in evidence and would never let deponent or Reba see it; that the form of the question and the way the paper was handled in the Court Room indicated that it was in the form of a retraction of what she had previously said and yet even though this took place in December 1953, no motion for a new trial is made until September of 1954; that with the conference being had at Newberry on Tuesday, the statement being obtained on Wednesday, and the following week counsel referring to it on trial, deponent can only conclude, as pointed out before, that the statement now of Reba Lewis is not in good faith and is only a culmination of the attempt made in 1953, when she was in the custody of the Industrial School, to secure a retraction.

That in addition to this, in the affidavit of M. B. Tucker, filed in the present proceedings, the last paragraph reads as follows: "After Mr. Whitener's trial and **while he was in the Richland County Jail,** I went to see him again and I told him that I was surprised that he had refused to take me as a juror on his case. I told him that I had come to see him for two reasons, (1) because he was in trouble and I wanted to visit him, and (2) because I was very curious as to why he had refused to accept me as a juror. His *verbatim* words to me were, 'I declare, Dan! I was sick. I didn't know what I was doing. I didn't see you at all'!"; the record shows that on March 30, 1954, three months after his conviction, Whitener was released on bond, pending his

appeal; that Tucker states his conversation with Whitener took place while he was in the Richland County Jail, and, if this is true, certainly Whitener knew of this incident before March 30, 1954, but not until September 30, 1954, did he make this known and only when he made application to the Supreme Court for a stay of the appeal.

Deponent further states that in addition to this, Reba Lewis was talked to by Dr. C. K. Lindler and many other persons out of the presence of the Solicitor and the prosecuting officers and at no time has she said to any of them that her statement to the officers was untrue; that this deponent was fully aware of the fact that delay of this trial would be fatal to its successful prosecution and was conscious of the fact that the interest of the public demanded that it be tried before the said child was released into the hands of a hostile mother and other members of the family; that the testimony of Whitener himself showed (folio 1389) that on the Tuesday of the week before the case was tried, the mother and the older sister were visiting Whitener in Newberry and certainly this child of eleven years of age could be persuaded to protect Whitener in every way possible, and for this reason deponent urged trial before such could take place.

Deponent can only conclude this affidavit by saying that he has the greatest admiration for the little 11 year old girl who has been able to stand all the onslaughts and coercion of the mother and elder sister and others involved in this case for the long period of time between December of 1953 and September 14, 1954, when, the far and distant County of Jasper, in the presence of the Honorable Former Speaker Pro-tem of the House, the present Senator, Sheriff and Clerk of Court of this great County, and others, she finally yielded.

AFFIDAVIT OF W. H. RAWLINSON

PERSONALLY appeared before me, W. H. Rawlinson, who, being duly sworn, deposes and says: That he is one of the Detectives for the City of Columbia, South Carolina.

That on the night of September 17, 1953, at about 6:45 p. m., he received a call to go to 1015 Whaley Street; that shortly thereafter, he arrived at said address and talked to a Mrs. Nezzie Whitten and Mrs. Whitten told him and Detective George A. Fulmer that a man known as Guy was driving a two tone Cadillac and had attempted to pick up a teen age boy and take him for a ride; that based on this information and information received from Shep's Drive-In, a general alarm was sent out on a Cadillac driven by Guy V. Whitener.

Deponent further states that later that evening, Officer O. W. Fisher stopped this car, in the City of Columbia, which was occupied by the said Guy V. Whitener and Reba Lewis; that both Guy Whitener and Reba Lewis were brought to Headquarters and Reba Lewis gave to deponent, in the presence of George A. Fulmer and Officer R. A. Shealy, a statement of what took place when she was allegedly assaulted by the said Guy V. Whitener; that this statement is hereto attached and made a part hereof; that this statement was given freely, voluntarily and without any promise of reward, and without any threats being made; that deponent has read the statement of Reba Lewis to the effect that deponent threatened to keep her in jail if she did not sign the said statement and deponent avers that such statement by Reba Lewis is false, untrue and unfounded in fact; that said statement was read to the said Reba Lewis and she thoroughly understood the contents thereof; and any statement to the contrary is false and untrue.

Deponent further states that before said statement was taken, this deponent took the said Reba Lewis to her home and talked with her mother, Mrs. Helen S. Lewis, who was next door to their home visiting a neighbor; that the said Reba Lewis related to Mrs. Lewis the facts of the assault; that this deponent told Mrs. Lewis that he desired to take Reba Lewis to a Doctor for examination and Mrs. Lewis stated to this deponent that she had just undergone an operation under the care of a Doctor and did not feel like accompanying them to the Doctor; that this deponent then took Reba Lewis to the office of Dr.

L. C. Davis, where she was given a physical examination and was later taken to Police Headquarters, where she gave the statement under the circumstances as above related; that thereupon, deponent returned Reba Lewis to her home, where she remained under the care and control of her mother until the morning of September 25, 1953, when she was committed to the South Carolina Industrial School, under the circumstances related in the affidavit of the Honorable Cal M. Lawson, Magistrate for Richland County.

That on the 18th day of September 1953, this deponent and Solicitor T. Pou Taylor visited Reba Lewis and her mother at the Lewis home; that Solicitor Taylor and this deponent discussed the alleged assault by the said Whitener and talked with Mrs. Lewis as to the advisability of placing the said child in the South Carolina Industrial School for Girls for the child's own benefit and interest and in the interest of the case pending against the said Guy V. Whitener; that Mrs. Lewis expressed the opinion that she thought it would be to the best interest of the said child to have her placed in the Industrial School and was perfectly willing for the same to be done; that at no time did this deponent or Solicitor Taylor tell Mrs. Lewis, Reba Lewis or anyone else that "we were taking Reba Lewis to the Carolina Rest Home"; that deponent made several additional calls to the Lewis home during the investigation of this matter and that at no time did this deponent state to Mrs. Lewis, Reba Lewis or anyone that "he had wanted to get his hand in Guy Whitener's pocketbook for a long time and now it looked like he had it"; that the said statement is false and untrue and, on the contrary, deponent is not now, has never been and hopes never to be interested in Mr. Whitener's pocketbook, bank account or any other assets that he might possess; and deponent having investigated this case from its inception verily believes and so states that said statement is the result of the use of some pocketbook somewhere, to somebody; as some proof of this statement, deponent attaches hereto a statement given, in the presence of this deponent, by Annette Ball, the elder sister of Reba Lewis, shortly after this case

arose, but who is now very diligent in her efforts to aid and comfort the said Guy V. Whitener, and this same Annette Ball is the one who later cried when the verdict of guilty was rendered against Whitener.

That deponent further states that he and Mrs. Florence Mertz, Superintendent of the South Carolina Industrial School for Girls, Detective George Fulmer, Assistant Solicitor John W. Foard, E. M. Suber of the South Carolina Law Enforcement Division and Solicitor T. Pou Taylor, were in Solicitor Taylor's office on the morning that Reba Lewis was brought to the Court House; that he knows it to be a fact that Reba Lewis was not told that if she didn't say what was in ther statement that she would be kept in the Industrial School for life but, on the contrary, deponent states that she was not threatened in any manner and appeared to be perfectly willing to testify to the facts as she knew them; that she did not appear to be frightened or afraid and seemed to be willing and desirous of telling the facts in the case as she knew them.

Deponent further states and denies most emphatically that he gave to Reba Lewis any money on this occasion, but does say that on the day that Reba was committed to the Industrial School, he gave to the person in charge of her the sum of $1.00 to purchase candies, etc. that she might want while in the institution; that this one dollar was given out of the generosity of his heart and deponent believes that it did not influence Reba Lewis one particle in the giving of her testimony.

Deponent further states that he was present in the Court Room on the occasion referred to in Reba Lewis' affidavit and that the same took place after the Court had recessed and the mother, who was sitting in the rear of the Court Room, came up to the Solicitor's desk where Reba was sitting, and apparently excitedly and frantically said words to the effect that she wanted her darling child home and, whereupon, Reba Lewis did cry.

Deponent further states that he was present in the Court Room when the verdict of the jury was rendered and he observed that Annette Ball, the older sister referred

to, and Mrs. Helen S. Lewis, joined said relatives of the defendant in crying and otherwise showing emotion.

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND. } **AFFIDAVIT**

PERSONALLY appeared before me, this date, an officer duly and legally authorized to administer oaths in the above named county and state aforesaid, comes one: HELEN ANNETTE S. BALL, who, makes the following statement under oath to-wit:

That I am a citizen and resident of Fitzgerald, Ga. That on Saturday, September 19, 1953, some time between the hours of 7 P. M. and 8 P. M., I received a long distance telephone call from Mr. Aubrey Harley, a practicing attorney in Newberry, S. C. The call was made by him from Columbia, S. C. Mr. Harley asked me if I would get off to come to Columbia. He said that I was the only one that could help Mr. Guy S. Whitener. He explained to me that Mr. Whitener was in trouble and that if I would come to Columbia, S. C. he would wire me the necessary money to make the trip. I told him that I would have to discuss the matter with my husband and would call him back Sunday September 20, 1953. I was not told at this time the nature of the trouble Mr. Whitener was in. I discussed the matter with my husband and decided not to go to Columbia. On Monday, September 21, 1953, my father became disturbed over the telephone call I had received on Saturday and called Mr. Aubrey Harley and told Mr. Harley that I was happily married and he did not want me getting into any trouble and Mr. Harley assured my father that I would not be involved in anything.

Thereafter, I received a money order in the amount of $100.00 from Mr. Harley and I left for Columbia on the night of the 21st of September, 1953. I arrived in Columbia on the morning of September 22, 1953. I went to my mother's home. She showed me clippings from the papers, from which I learned for the first time the exact trouble that Mr. Whitener was in. On the 22nd day of September, 1953, I called Mr. Harley and later met him down town and we had breakfast at Martin Roberts' Restaurant. We

then went to the Richland County Jail and talked to Mr. Guy Whitener. Mr. Harley went in first and later came back and got me. Mr. Whitener asked me to cooperate with him first to help him to get out on bond. Mr. Whitener told me that if I did not cooperate with him, he would tell everything. He said he would tell that it wasn't the first time that he had been ou with my little sister, Reba Lewis, and that my mother had given him permission to take my sister out even if that is a lie. I asked him what about Mr. Rawlinson. He said "when I got out on bond, I will take care of him."

We left the County Jail and went to see Mr. Lee Baker and Mr. Dave Baker, attorneys. The purpose in going to see the Bakers was that Mr. Whitener wanted to retain these lawyers for me for the purpose of keeping my family from prosecuting him in the charges against him involving my sister. We discussed the matter and I returned to my mother's home. I talked to my sister and became convinced that Mr. Whitener was guilty of an attack on my sister. I then called Mr. Dave Baker and explained to him I was convinced that Mr. Whitener was guilty of raping my sister and I did not care to discuss the matter with him any further and did not care to have anything to do with Mr. Whitener, Mr. Harley and anyone else connected with Mr. Whitener.

The statement is made in the presence of City Detective W. H. Rawlinson; Lollie G. Easterling and John W. Foard, Jr., Assistant Solicitor, of Columbia, S. C.

I make this statement of my own free will, and accord, without reward, or intimidation. All of the above is the truth, the whole truth and nothing but the truth so help me God.

/s/ HELEN ANNETTE S. BALL.

SWORN to before me this
23rd day of September, 1953.

LOLLIE G. EASTERLING (L. S.)
Notary Public for South Carolina.

AFFIDAVIT OF MRS. FLORENCE S. MERTZ

PERSONALLY appeared before me, Florence S. Mertz, who, being duly sworn, deposes and says: That she is now and has been for the past 11 years Superintendent of the South Carolina Industrial School for White Girls; that on the 25th day of September, 1953, she received in her custody one Reba Lewis (Reba Loretta Stankowitz), who remained in her custody until the 24th day of December, 1953, at which time she was released and returned to her mother.

Deponent further states that during the time that the said Reba Lewis was residing in said institution, this deponent allowed the family of the said child to visit her almost at will and at no time was Mrs. Helen S. Lewis or any member of the Lewis family denied the right to see and visit the said child; that during said time and on several occasions, the said Helen S. Lewis stated to this deponent that she was in bad health and highly nervous; that this deponent therefore did everything possible to make Mrs. Lewis comfortable and allowed her to see the said child on every occasion she requested and even offered to allow Mrs. Lewis to live at said institution in order that she could be nearer her daughter; that Mrs. Lewis seemed to be pleased with the arrangements and, for example, on Thursday, November 19, 1953, Mrs. Lewis visited her daughter at the said institution and at that time told deponent that she was well pleased with the arrangements made concerning her daughter; that during said time that Reba Lewis was residing in said institution, not only was her family allowed to visit her but others, including Mr. Frank L. Taylor, Attorney for the Lewis family and Mr. Taylor's Secretary, were allowed to and did visit the said child; that on one occasion, Mr. Frank L. Taylor visited Reba Lewis and brought her some fruit and on another occasion his Secretary brought her some clothes.

Deponent further states that she knows of no occasion when the said Reba Lewis was mistreated in any manner in said institution; that Reba Lewis was placed in a room with an Honor girl to help look after her; that the said child attended school at said institution.

That deponent has read the affidavit of Reba Lewis, filed in the motion of Guy V. Whitener for permission to move for a new trial in the General Sessions Court; that she has particularly noted the statement of Reba Lewis to the effect that every night her matron, Mrs. Kinlaw, made her study an affidavit allegedly previously made by her; that deponent never saw the said Reba Lewis with any paper, studying it or otherwise, while she was residing at said Industrial School and this deponent believes that the said Reba Lewis was not in possession of such a statement while residing at said institution, and that any statement to the contrary is false, untrue and not borne out by the facts.

That on the morning of the trial of the case, this deponent brought Reba Lewis to the Richland County Court House and took her to the office of Solicitor T. Pou Taylor; that deponent, Detective W. H. Rawlinson, Assistant Solicitor John W. Foard, Jr., E. M. Suber of the South Carolina Law Enforcement Division, and Solicitor T. Pou Taylor were present in said office; that deponent heard everything that was said and saw everything that was done and at no time did Solicitor Taylor or Detective Rawlinson or anyone else threaten the said Reba Lewis and neither did anyone tell her that she would be kept at the Industrial School all her life if she didn't say what was on the paper she "had studied"; that everyone was as cordial to the little girl as was possible and she was asked to tell the truth and nothing more; that deponent observed nothing that would make her believe that Reba Lewis was frightened or was scared in any way, but seemed to be willing and desirous of telling the facts of the case as she knew them; that deponent did not observe Detective Rawlinson giving to the said Reba Lewis any money whatsoever nor did anyone else give to Reba Lewis any money, but Solicitor Taylor did give her $1.00 after Court had recessed for the day.

That deponent was in the Court Room during the trial of this case and was present when Reba Lewis cried in the Court Room; that this occurred after Reba had testified and the Court had recessed for the day; that Reba

Lewis was sitting with this deponent near the desk of the Solicitor and the mother of said child came back from the back of the Court Room to where Reba was sitting and made some remark to the effect that she wanted her darling child home, and that caused the child to become excited and she cried.

That on the 24th day of December, 1953, after the trial of Guy V. Whitener was completed, Reba Lewis was returned to her mother.

AFFIDAVIT OF MISS ARTIMICHA KINLAW

PERSONALLY appeared before me, Miss Artimicha Kinlaw, who, being duly sworn, deposes and says:

That she is now and has been employed by the State of South Carolina for many years as a matron at the South Carolina Industrial School, located near the City of Columbia, South Carolina.

That on or about the 25th day of September, 1953, as shown by the record of commitment, one Reba Lewis, of Richland County, was committed to the said institution by the Honorable Cal N. Lawson, Magistrate for Richland County, and remained in said Institution until the 24th day of December, 1953, when she was discharged by law; that during the time the said Reba Lewis was residing at said institution, she was under the care and supervision of deponent and that during said time, her parents and family were permitted to visit her almost at will.

That deponent knew that the said Reba Lewis was the prosecuting witness in the case against one Guy Whitener, pending in the General Sessions Court for Richland County, but deponent had no interest whatsoever in said cause, not having known the said Whitener nor the said Reba Lewis until her admittance in said institution; that deponent has read the affidavit of Reba Lewis filed in the motion of Guy V. Whitener before the Supreme Court of South Carolina for permission to move for a new trial in the General Sessions Court, and particularly has she noted the statement of Reba Lewis to the effect that every night deponent made her study an affidavit allegedly previously made by her; that deponent never saw the said Reba Lewis

with any paper, studying it or otherwise, while she was residing at the said Industrial School; and that deponent avers that the said statement is untrue, false and has no basis of fact, as deponent had never seen any statement allegedly made by the said Reba Lewis, had no knowledge of the existence of the same and in nowise influenced or attempted to influence or intimidate the said Reba Lewis to make any statement or to testify in Court; that deponent had never heard of any such accusation until the afternoon of September 30, 1954, when she was informed by the office of the Solicitor of the Fifth Judicial Circuit of the existence of such an affidavit by Reba Lewis.

That deponent knows of no occasion when the said Reba Lewis was mistreated in any manner in said institution and alleges that she was treated very considerately at said institution, and was even placed in a room with an Honor Girl to help look after her.

AFFIDAVIT OF E. M. SUBER

PERSONALLY appeared before me, E. M. Suber, who, being duly sworn, deposes and says: That he is a member of the South Carolina Law Enforcement Division, and on the day of the opening of the December 1953 term of General Sessions Court for Richland County, he was requested by Mrs. Florence S. Mertz to accompany her in the bringing of Reba Lewis to the Court for appearance before the Grand Jury.

Deponent further states that he later brought her to the same Court for the purpose of testifying in the trial and that she was brought directly to the Solicitor's office where there was present, according to deponent's best recollection, the following: W. H. Rawlinson and George A. Fulmer, Detectives, Mrs. Florence S. Mertz, Solicitor T. P. Taylor and Assistant Solicitor John W. Foard, Jr.; that at no time did Reba Lewis claim that her previous statement given to the officers in the case was untrue, but that she seemed to be willing to state the facts as she knew them; that neither Detective Rawlinson, Solicitor Taylor nor anyone else attempted to coerce, intimidate or to influence her in any manner in the giving of her testimony

and that she appeared to testify freely, voluntarily and willingly.

AFFIDAVIT OF GEORGE A. FULMER

PERSONALLY APPEARED BEFORE ME, George A. Fulmer, who, being duly sworn, deposes and says: That he is now and has been for the past 17 years a member of the Detective Force for the City of Columbia, South Carolina.

That on the night that one Guy V. Whitener was arrested on the complaint of one Reba Lewis that he had committed the crime of Rape upon her, the deponent was on duty as such Detective and was working with Detective W. H. Rawlinson; that he has read over the affidavit of one Reba Lewis, filed in the motion of Guy V. Whitener for permission to move for a new trial, and particularly that part which has to do with the signing of a written statement concerning the alleged rape and the exercise of alleged duress upon her in the giving of her testimony, and deponent avers that such statements are false and untrue; that he was present with Mr. Rawlinson the night of the occurrence when Reba Lewis signed a written statement as to what occurred and that she was in no wise threatened or induced to sign any statement, either by Mr. Rawlinson or this deponent, and that any statement to the contrary is untrue; that Mr. Rewlinson did not dictate to another what was to be written in said statement but that the same was told by Reba Lewis herself

Deponent further says that the signing of said statement took place after deponent and Detective Rawlinson had taken Reba Lewis to her home to inform her mother of what had occurred, and told her mother that they wanted to take her to a Doctor for examination and to obtain a written statement of her complaint; that the mother of Reba Lewis was asked to accompany deponent and Detective Rawlinson to the Doctor and to Police Headquarters to obtain such written complaint but the mother, who was visiting a neighbor at the time, complained that she was too sick to do so; that immediately upon seeing her mother, Reba Lewis related to her substantially what was later

contained in her statement, and that the statement of Reba Lewis that, "I told her that Guy Whitener didn't bother me," is untrue and false; and neither did she tell her mother that she, Reba Lewis, had told the police "Mr. Whitener didn't bother me but they made me sign the paper anyway," because no such paper was in existence at that time; that during this night and at the time deponent and Detective Rawlinson took the said Reba Lewis to the home of her mother, the said mother stated to them words to the following effect: "Please don't let my husband find this out. He would kill Whitener because there has been some trouble between one of my daughters and Whitener before."

That on the morning that Reba Lewis was brought to the Richland County Court House by Mrs. Mertz, Superintendent of the South Carolina Industrial School, and shortly before the trial of said case, deponent, Mrs. Florence Mertz, Detective W. H. Rawlinson, Assistant Solicitor John W. Foard, Jr., E. M. Suber of the South Carolina Law Enforcement Division, and Solicitor T. Pou Taylor were present when she was brought into the office of Solicitor Taylor; that deponent was present and heard everything that was said and saw everything that was done and at no time did Solicitor Taylor or Detective Rawlinson or anyone else threaten the said Reba Lewis and neither did anyone tell her that she would be kept at the Industrial School all her life if she didn't say what was on the paper she "had studied"; that everyone was as cordial to the little girl as was possible and she was asked to tell the truth and nothing more; that deponent observed nothing that would make him believe that Reba Lewis was frightened or was scared in any way, but seemed to be willing and desirous of telling the facts of the case as she knew them; that deponent did not observe Detective Rawlinson giving to the said Reba Lewis any money whatsoever nor did anyone else give to Reba Lewis any money in his presence.

That deponent was in the Court Room during the trial of this case and was present when Reba Lewis cried in the Court Room; Deponent recalls that this was after she had testified and the Court had recessed for the day and

Reba Lewis was sitting near the desk of the Solicitor, with Mrs. Mertz; that the mother of Reba Lewis came from the back of the Court Room to where Reba Lewis was sitting and made some remark to the effect that she wanted her darling child home, and that caused the child to become excited and cried.

Deponent further states that, while the mother indicated a fervent desire shortly after Whitener was arrested to have him prosecuted most vigorously by the State for his act, she later, and particularly for a week or two before the trial, became very hostile, uncooperative and antagonistic toward all who were trying to bring Whitener to justice; and during the trial, she was trying her best to get to Reba Lewis and, as deponent verily believes, to influence her to retract her statements or to possibly say "I don't remember."

AFFIDAVIT OF R. A. SHEALY

PERSONALLY appeared before me, R. A. Shealy, who, being duly sworn, deposes and says: That he is now and has been for a number of years a member of the Columbia Police Force, presently being employed in the identification department.

That he was on duty the night that Reba Lewis made a complaint against Guy V. Whitener for an alleged assault and was present when she made a written affidavit as to what occurred; that said statement was made freely and voluntarily and that no threat of any kind was made against her and that any statement to the contrary is untrue; that deponent has read the affidavit of Reba Lewis to the effect that she was coerced into signing the same and that the statement was dictated by Detective W. H. Rawlinson, and avers that such statement by Reba Lewis is false and untrue; that on the following day, Reba Lewis gave a more complete written statement in the presence of deponent and, likewise, the same was given freely and voluntarily and after Reba Lewis had spent the night with her mother.

AFFIDAVIT OF JOHN W. FOARD, JR.

PERSONALLY appeared before me, John W. Foard, Jr., who, being duly sworn, deposes and says: That he is the duly appointed and qualified Assistant Solicitor of the Fifth Judicial Circuit.

That he has read the affidavit of Solicitor T. P. Taylor, dated October 1, 1954, in this matter, and deponent states that he was with the Solicitor on most of the occasions referred to in this affidavit and that the contents of said affidavit are true and any statement to the contrary is false, untrue and not borne out by the facts.

Deponent further states that in addition to the matters set forth in the affidavit of Solicitor Taylor, he wishes to add that on the morning of September 25, 1953, at the request of the Solicitor, this deponent met with Detective W. H. Rawlinson, Magistrate Cal M. Lawson, Mrs. Helen S. Lewis, Reba Lewis, Captain L. C. Williams and the Solicitor's Secretary, in the Solicitor's office; that this meeting took place while the Solicitor was in attendance at the General Sessions Court for Richland County, South Carolina; that at said time and place, this deponent prepared a warrant charging Reba Lewis (Reba Stankowitz) as a material witness in the case of *State v. Guy V. Whitner,* and Judge Lawson signed an Order committing the said Reba Lewis to the South Carolina Industrial School as a material witness in said case; that shortly thereafter, Reba Lewis was taken to the South Carolina Industrial School where she remained until trial of the case was had in December of 1953; that all parties present, including Mrs. Lewis and her daughter Reba, knew and understood that Reba Lewis was being placed in the South Carolina Industrial School and this was done with the full approval and consent of Mrs. Lewis.

Deponent further states that he was present in the Solicitor's office on the day Reba Lewis was brought to the Court House to testify, and saw and heard everything that transpired; that at no time did anyone, including the Solicitor, Mr. Rawlinson and this deponent, threaten or in anywise coerce or attempt to influence Reba in the giving

of her testimony and that she appeared to be perfectly willing to do so.

That deponent was present and participated in the trial of this case and that, in his opinion, the said Guy V. Whitener was afforded a fair and impartial trial in every respect.

AFFIDAVIT OF CAL M. LAWSON

PERSONALLY appeared before me, Cal M. Lawson, who, being duly sworn, deposes and says: That he is the Waverly Magistrate for Richland County, South Carolina, and in whose district the alleged assault of Guy V. Whitener upon one Reba Lewis took place.

That on or about the 25th day of September, 1953, deponent was requested to come to the office of Solicitor T. Pou Taylor, with reference to said case, and found in said office, upon his arrival, the said Reba Lewis, her mother Mrs. Helen S. Lewis, Detective W. H. Rawlinson, Assistant Solicitor John W. Foard, Jr., Mrs. Ray Easterling, Secretary to Solicitor Taylor, and Solicitor T. Pou Taylor; that upon entering said office, deponent, Detective Rawlinson, Mrs. Lewis, Reba Lewis and Solicitor Taylor went into his private office and there deponent was told by Solicitor Taylor that the State desired a warrant for Reba Lewis, as a material witness in the case against Guy V. Whitener, and requested deponent to issue such; that deponent recalls distinctly that Mrs. Helen S. Lewis, the mother of the said Reba Lewis, stated that she preferred the child being placed in some institution for her own safety as her husband, the stepfather of the said Reba Lewis, was in Charleston, South Carolina, and that she, therefore, feared for the safety of her said child; that deponent nor anyone else told Reba Lewis or her mother that she was being placed in a private school, but that it was fully discussed and disclosed that she was being placed in the South Carolina Industrial School for her own safety and welfare; that all of said procedure was done with the full approval and sanction of the said mother.

That said warrant having been issued, deponent further states that he later fixed bond for her release from said Institution, at $5,000.00, and up to the 30th day of

November 1953, deponent received no request for her release from said institution and only did he receive such request after *habeas corpus* proceedings were commenced in the Court of General Sessions and an Order of Judge Henderson passed refusing such writ partly on the ground that petitioners had not exhausted their remedies in deponent's Court, the Order of Judge Henderson being dated December 1, 1953, and on file in the office of the Clerk of Court for Richland County; that thereafter, application was made to deponent for bail and due to the development of the case, bond was fixed at $7,000.00; that attached to this affidavit is a correct copy of the proceedings had before me upon such application.

IN THE MAGISTRATE'S COURT

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

THE STATE,
-vs-
GUY V. WHITENER:
REBA LEWIS—REBA STANKOWITZ
Witness.

A HEARING FOR APPLICATION FOR BOND

Frank Taylor, Attorney represented Mr. and Mrs. Lewis.

FRANK TAYLOR: I am here in behalf of Mr. and Mrs. Lewis. This hearing was held before Judge Henderson and there are two orders that I knew nothing about before I went to court. It is my understanding that you are holding Reba Lewis as a material witness against Whitener on two orders rescinding. You fixed bond at first of $5,000.00 and then decided that that was insufficient. Judge Henderson said we had a right to bond before you on your last order and we are here on behalf of the child. We want you to set a bond for the material witness in the case against Whitener. Of course, when I was Magistrate I don't ever remember anything like this coming up before me and these people are just ordinary people and we would like for you to set a reasonable bond.

JUDGE LAWSON: When I set the bond I thought it was a pretty rough case. I set it for $5,000.00.

FRANK TAYLOR: Mrs. Lewis didn't know anything about the bond being set, or the child would have been out before now.

JUDGE LAWSON: I contacted the mother and the child and talked to both of them.

FRANK TAYLOR: Did you tell her a bond was set.

JUDGE LAWSON: I don't remember whether I told her about the bond or not.

FRANK TAYLOR: Nobody ever knew any bond was set and they didn't know anything about a bond but the order was passed.

JUDGE LAWSON: When she was sent out to the Industrial School a copy was sent out with her.

FRANK TAYLOR: Regardless of that we are here to have a bond set.

JUDGE LAWSON: You don't have Mrs. Lewis here with you.

FRANK TAYLOR: Mrs. Lewis is in right bad health but if you want her to be here I think we can get her. The father is here.

JUDGE LAWSON: Has she changed her mind about the child being out of danger.

FRANK TAYLOR: Mr. Lewis is here and he is the head of the family and supporting the family.

JUDGE LAWSON: Mr. Lewis and Mrs. Lewis are two different people. Mr. Lewis is the stepfather of the child and I don't think he would have the same feeling over the child as the mother.

FRANK TAYLOR: If they thought there was any danger now they wouldn't want the child out and I still want you to set bond for her.

JUDGE LAWSON: When I talked to Mrs. Lewis she and the child were both there together and Mrs. Lewis said she wanted the child put somewhere where it would be safe for her. I told her we could either put her in Richland County Jail or the Industrial School for girls but that I didn't think that Richland County Jail was the proper place for a child. Has the mother changed her mind that

she is not fearing for the child's safety. When I talked to the mother she said she was scared for the child. The child was sitting there by her mother and her mother kept telling her that there would be a lot of other little girls out there and I know you would rather be there than here.

FRANK TAYLOR: Mrs. Lewis told me that she thought the girl was to be put in a private home and not the Industrial School where they are punishing girls.

JUDGE LAWSON: It is my understanding that you are representing the family and wanted a bond. Mrs. Lewis is the one that wanted the child to be taken care of and consented for the child to be put in the Industrial Home. We are not going to refuse your bond but for my own satisfaction and conscience I would like to know who has given Mrs. Lewis assurance that the child is not in any danger. I would like for her to be here.

FRANK TAYLOR: We can go get Mrs. Lewis and bring her down here. I have a letter showing that she wanted to get Reba Lewis out.

Mr. Lewis left to go get Mrs. Lewis.

Solicitor Taylor suggested that we take the testimony of Mrs. Lewis.

FRANK TAYLOR: This is not a hearing and I don't see any use in taking the testimony.

SOLICITOR TAYLOR: Well the Judge asked whether or not the mother had changed her mind or not and if she thought the child was out of danger.

FRANK TAYLOR: Well it's all right with me to take down what Mrs. Lewis says.

JUDGE LAWSON QUESTIONS MRS. LEWIS:

Q. Mrs. Lewis have you changed your mind about the safety of the child?

A. I can't stand it any longer every time I go to see her she crys to come home with me.

Q. Mrs. Lewis when I talked to you, you were fearful for your child to be at home. What has convinced you that the child will be safe at home now?

A. My husband was out of town then but he is at home now and there won't be any danger.

Q. When I talked to you, you were perfectly willing that the child should be taken care of, now if the child gets out on bond and if something happens to her, I want to feel that the responsibility has been lifted from my shoulders by your request, for bond for the child?

A. I want her at home with me, you can post a guard at my house or in my house if you want to, I have stood it just about as long as I can.

FRANK TAYLOR: Mrs. Lewis is sick and nervous.

MRS. LEWIS: I'm not too sick to take care of my child and I want her at home with me.

JUDGE LAWSON: Do you have anything you want to ask her?

FRANK TAYLOR: No.

FRANK TAYLOR: Mrs. Lewis, you can go back and sit in the car now.

JUDGE LAWSON: I think that the bond I set before is insufficient because of the seriousness of the case. She being the main witness and I am going to set the bond at seven thousand ($7,000.00) Dollars. I think the child is the main witness and I think it's due the people that we work for to show that she will be at the hearing in December court.

I certify that this is a true and correct copy as to the best of my knowledge and ability. Dec. 5, 1953.

/s/ LYDA E. MELTON.

SWORN to before me this
5th day of December, 1953.
/s/ CAL M. LAWSON (L. S.)
CAL M. LAWSON, Magistrate.

AFFIDAVIT OF DR. C. K. LINDLER

PERSONALLY appeared before me, Doctor C. K. Lindler, who, being duly sworn, deposes and says: That he is a practicing Physician in the City of Columbia, and is one of the duly appointed and qualified Physicians for Richland County, South Carolina.

That heretofore, to wit, on the 17th day of December, 1953, by order of Judge E. H. Henderson, Presiding Judge of the Fifth Judicial Circuit, deponent and Dr. Henry F. Hall, the other Physician for Richland County, were ordered to examine one Guy V. Whitener in the Newberry Hospital at Newberry, South Carolina; that deponent and the said Dr. Hall did make such examination and introduced themselves to the said Whitener in said hospital; that the said Whitener appeared at said time to be in full possession of his mental capacities.

That thereafter, to wit, on the 21st day of December, 1953, deponent, in company with said Dr. Hall, again examined Whitener in the Newberry Hospital and no further introduction was necessary as he recognized and called both by names at said time.

That thereafter, again on the 22nd day of December, 1953, deponent and the said Dr. Hall were in the Richland County Court Room when they were instructed to re-examine Whitener in one of the jury rooms; that the results of their findings are given in the transcript of record in said matter and that they, at that time, detected nothing that would indicate that Whitener was not fully cognizant of all around him and was not in full possession of all his mental capacities; that again the said Whitener recognized and called by name deponent and the said Doctor Hall upon their entrance into the room in which he was sitting.

Deponent further states that he and Dr. Hall thoroughly examined the said Whitener on three occasions and examined all hospital records and fully discussed the history of his alleged illenss; and that in deponent's opinion, the said Whitener was fully capable, both physically and mentally, to properly defend himself in the trial of his case; and deponent says further that, in his opinion, the said Whitener was physically and mentally able to recognize any intimate acquaintance as any other normal person would do under the circumstances; that shortly after such examination, the said Whitener testified in open Court as to his physical condition and again deponent saw nothing

that would indicate that he, Whitener, was not in possession of all of his mental faculties.

AFFIDAVIT OF DR. HENRY F. HALL

PERSONALLY appeared before me, Doctor Henry F. Hall, who, being duly sworn, deposes and says: That he is a practicing Physician in the City of Columbia, and is one of the duly appointed and qualified Physicians for Richland County, South Carolina.

That heretofore, to wit, on the 17th day of December, 1953, by order of Judge E. H. Henderson, Presiding Judge of the Fifth Judicial Circuit, deponent and Dr. C. K. Lindler, the other Physician for Richland County, were ordered to examine one Guy V. Whitener in the Newberry Hospital at Newberry, South Carolina; that deponent and the said Dr. Lindler did make such examination and introduced themselves to the said Whitener in said Hospital; that the said Whitener appeared at said time to be in full possession of his mental capacities.

That thereafter, to wit, on the 21st day of December, 1953, deponent, in company with said Dr. Lindler, again examined Whitener in the Newberry Hospital and no further introduction was necessary as he recognized and called both by names at said time.

That thereafter, again on the 22nd day of December 1953, deponent and the said Dr. Lindler were in the Richland County Court Room when they were instructed to reexamine Whitener in one of the jury rooms; that the results of their findings are given in the transcript of record in said matter and that they, at that time, detected nothing that would indicate that Whitener was not fully cognizant of all around him and was not in full possession of all his mental capacities; that again the said Whitener recognized and called by name deponent and the said Doctor Lindler upon their entrance into the room in which he was sitting.

Deponent further states that he and Dr. Lindler thoroughly examined the said Whitener on three occasions and examined all hospital records and fully discussed the history of his alleged illness; and that in deponent's

opinion, the said Whitener was fully capable, both physically and mentally, to properly defend himself in the trial of his case; and deponent says further that, in his opinion, the said Whitener was physically and mentally able to recognize any intimate acquaintance as any other normal person would do under the circumstances; that shortly after such examination, the said Whitener testified in open Court as to his physical condition and again deponent saw nothing that would indicate that he, Whitener, was not in possession of all of his mental faculties.